

United States
Circuit Court of Appeals
for the Ninth Circuit.

WILLIAM H. NOVICK and ANNETTA
NOVICK,

Appellants,

vs.

ANSON E. GOULDSBERRY,

Appellee.

Transcript of Record

Upon Appeal from the District Court
for the Territory of Alaska,
Third Division.

FILED

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PAUL B. O'BRIEN, CLERK

No. 11869

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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DAVIS & RENFREW,
Anchorage, Alaska,

Attorneys for Anson E. Gouldsberry, plain-
tiff and appellee.

In the District Court for the Territory of Alaska,
Third Division

No. S-4337

ANSON E. GOULDSBERRY,

Plaintiff,

vs.

WILLIAM H. NOVICK, ANNETTA NOVICK,
WILLIAM CARROLL AND LUCILLE
CARROLL,

Defendants.

COMPLAINT

Comes now the plaintiff above named, and for his cause of action against the defendants, and each of them, alleges as follows:

I.

That during all times hereinafter mentioned the defendant William H. Novick and the defendant Annetta Novick were, and they now are, husband and wife.

II.

That during all times hereinafter mentioned the defendant William Carroll and the defendant Lucille Carroll were, and they now are, husband and wife.

III.

That during all times hereinafter mentioned the defendants William H. Novick and Annetta Novick were, and they still are, the owners and operators of a certain public cocktail lounge at Seward, Alaska, known as Novick's Cocktail Lounge.

IV.

That during all times hereinafter mentioned the defendant William Carroll was the servant, agent and employee of William H. Novick and Annetta Novick in their cocktail lounge business known as Novick's Cocktail Lounge at Seward, Alaska, and defendant William Carroll, during all of such times was acting for and on behalf of [1*] the defendants William H. Novick and Annetta Novick and acting in the course of his employment as a servant and employee of such defendants.

V.

That on the 5th day of July, 1946, the plaintiff was lawfully on the premises owned and occupied by the defendants William H. Novick and Annetta Novick doing business as Novick's Cocktail Lounge at Seward, Alaska, and seated at the bar as a customer of such establishment, and that there were present at such time and place the defendants, Annetta Novick, William Carroll and Lucille Carroll as well as the plaintiff and several other customers of Novick's Cocktail Lounge.

VI.

That on such 5th day of July, 1946, and while plaintiff was upon the premises owned and controlled by the defendants William H. Novick and Annetta Novick at Seward, Alaska, and known as Novick's Cocktail Lounge, as above described, the said William Carroll, acting as agent, servant and

* Page numbering appearing at foot of page of original certified Transcript of Record.

employee of William H. Novick and Annetta Novick, as above described, without cause or provocation unlawfully and unjustly assaulted and battered plaintiff by striking plaintiff with great force and violence over the head with a bottle, and by knocking plaintiff violently to the floor.

VII.

That thereupon defendants William Carroll and Lucille Carroll and Annetta Novick beat plaintiff about his head and body with their fists and kicked plaintiff in various parts of his body with their feet, all as plaintiff lay partially stunned upon the floor near the bar of Novick's Cocktail Lounge and that during all of such time the other defendants were being incited and urged by the defendant Annetta Novick to beat and kick the plaintiff. [2]

VIII.

That by reason of the assault made upon plaintiff by defendants and by reason of the beating administered to plaintiff by the defendants, plaintiff's left ankle was broken, his lip was cut and he was cut near his left eye, his head was injured, he was scratched in numerous places, and he received bruises and contusions and abrasions over most of his body.

IX.

That after the plaintiff had been severely beaten by the defendants as above set out, without any provocation or just cause, defendants had plaintiff arrested by the Seward police and as a result of such arrest plaintiff, beaten and battered as he was,

and suffering from a broken ankle, was incarcerated in the Seward jail and denied medical assistance or the privilege of seeing friends or the right of giving bail, and that plaintiff was confined to jail under such circumstances for twelve hours before he was finally admitted to bail.

X.

That as a direct result of the beating administered to plaintiff by the defendants above described plaintiff was confined to the hospital at Seward, Alaska, for five days and incurred hospital bills in the sum of Thirty-five Dollars and medical fees in the sum of Fifty-two Dollars and that such sums were reasonable, necessary and proper.

XI.

That on the 5th day of July, 1946, and for a long time prior thereto, plaintiff was employed at Seward, Alaska, as a longshoreman and that in such employment plaintiff averaged Seven Hundred Fifty Dollars or more per month in wages. That as a direct result of the injuries inflicted upon plaintiff by the defendants, as above described, plaintiff was wholly unable to pursue his employment as a longshoreman for a period of three months after the 5th day of July, 1946, and the plaintiff has thereby been damaged in the sum of Two Thousand Two Hundred Fifty Dollars by reason of lost wages. [3]

XII.

That by reason of the assault made upon plaintiff by defendants and the injuries resulting therefrom,

and the neglect of his injuries after their infliction, plaintiff endured grievous pain, suffering and distress, and that such injuries still continue and for a long time to come will continue to cause pain and suffering to plaintiff. That as plaintiff is informed and believes and so alleges the fact to be, some of the injuries plaintiff received from the defendants are permanent in nature. That by reason of his arrest and incarceration in a filthy and loathesome common jail plaintiff has been humiliated. That by reason of such pain and suffering so far suffered by the plaintiff and pain and suffering which must be endured by the plaintiff in the future, as a result of his injuries at the hands of the defendants, and as a result of the indignities and the scorn and humiliation heaped upon plaintiff by reason of his arrest and incarceration at the instigation of defendants, plaintiff has been damaged in the additional sum of Fifteen Thousand Dollars.

XIII.

That in making the assault upon plaintiff and in beating him, and in causing his arrest and incarceration all as above set forth, the defendants, and each of them, acted maliciously and in wanton disregard of the rights and feelings of plaintiff, and by reason thereof plaintiff demands exemplary and punitive damages against said defendants in the sum of Five Thousand Dollars.

Wherefore, plaintiff prays for judgment against the defendants and each of them as follows:

1. For hospital and medical expenses incurred by him in the sum of \$87.00.

2. For the sum of \$2,250.00 for loss of wages.
3. For the sum of \$15,000.00 as and for compensatory damages. [4]
4. For the sum of \$5,000.00 as and for punitive damages.
5. For plaintiff's costs and disbursements in this action incurred.

DAVIS & RENFREW,
Attorneys for Plaintiff.

By /s/ EDWARD V. DAVIS.

United States of America,
Territory of Alaska—ss.

Anson E. Gouldsberry, being first duly sworn, upon his oath, deposes and says:

That he is the plaintiff named in the within and foregoing Complaint, that he has read said complaint, knows the contents thereof and that the same is true as he verily believes.

/s/ ANSON E. GOULDSBERRY.

Subscribed and sworn to before me this 20th day of November, 1946.

[Seal] /s/ EDWARD V. DAVIS,
Notary Public in and for the Territory of Alaska.
My commission expires November 7, 1950.

[Endorsed]: Filed Nov. 20, 1946. [6]

[Title of District Court and Cause.]

DEMURRER

Come now the defendants in the above-entitled action and demur to the Complaint of the Plaintiff filed herein, on the ground that several causes of action have been improperly united.

/s/ R. E. BAUMGARTNER,
Attorney for Defendants.

[Endorsed]: Filed Dec. 20, 1946. [7]

[Title of District Court and Cause.]

Minute Order

OVERRULING DEMURRER

Now at this time the plaintiff not being present in court but represented by William W. Renfrew of his counsel, the defendant not being present in court nor represented by counsel, and the Court being fully and duly advised in the premises,

It Is Ordered that defendant's demurrer to the complaint in cause No. S-4337, entitled Anson E. Gouldsberry, plaintiff, versus William H. Novick, Annetta Novick, William Carroll and Lucille Carroll, defendants, be, and it is hereby overruled, and defendant granted two weeks within which to answer.

Entered Court Journal No. G12, Page No. 440,
Jan. 3, 1947. [8]

[Title of District Court and Cause.]

ANSWER

Come now the defendants above-named, and for their answer to the Complaint of the plaintiff above-named, admit, deny and allege as follows:

I.

The defendants admit the allegations contained in paragraphs I, II and III of plaintiff's complaint.

II.

The defendants admit that the defendant William Carroll was in the *employee* of the defendants William H. Novick and Annetta Novick, in the place of business known as Novick's Cocktail Lounge, at Seward, Alaska; but challenge the implication concealed in said allegation as a device by which plaintiff seeks to hold defendants William H. Novick and Annetta Novick responsible for the personal behavior and conduct of the defendant William Carroll.

III.

Defendants admit that on the 5th day of July, 1946, the plaintiff was seated at the bar of Novick's Cocktail Lounge at Seward, Alaska, and further admit that there were present [9] at such time and place the defendants William Carroll and Lucille Carroll as well as several visitors and patrons, but deny that the defendant Annetta Novick was present while plaintiff was so seated at said bar.

Further answering paragraph V of plaintiff's complaint, the defendants allege that during all the

time that plaintiff was seated at, or standing near, the bar of the cocktail lounge aforesaid, the defendant Annetta Novick was attending to her duties in an adjacent store, being a business entirely separate and apart from the said cocktail lounge, and not connected by doors or otherwise with said cocktail lounge.

IV.

Defendants deny each and every allegation contained in paragraph VI of plaintiff's complaint, and allege that on the 5th July, 1946, defendant William Carroll was employed as a bartender at the Cocktail Lounge aforesaid and was on active duty; that the defendant Lucille Carroll was seated at said bar visiting with her husband, William Carroll, to whom she had been married only a short time; that defendant Lucille Carroll had obtained a divorce from plaintiff, Anson E. Gouldsberry, on the 27th May, 1946, and the plaintiff was desperate in his efforts to bring about a rupture in the marriage of defendants Lucille Carroll and William Carroll. That the plaintiff did then and there address the defendant Lucille Carroll in a most indecent, vile, bestial and threatening language, and did then and there make an assault upon the defendant Lucille Carroll; that the defendant William Carroll, in order to protect his wife and himself and to preserve the peace of the establishment of which he was in charge, did order the plaintiff to desist; but plaintiff, having in his hand a half-filled bottle of beer, which he had been wielding in a threatening manner, hurled said bottle at defendant William Car-

roll, [10] and having missed striking him with it, immediately grasped from the bar the bottle from which another patron had been drinking, and would have thrown it at defendant William Carroll with great force and violence and severely injured him with it, if defendant William Carroll had not immediately defended himself. That the defendant William Carroll did defend himself and his wife against said murderous and maniacal assault and in doing so did not use any more force than was reasonably necessary under the circumstances to protect his wife, and himself from injury, and to preserve the peace and protect the other persons lawfully present. That the defendant William Carroll endeavored only to persuade the plaintiff to depart therefrom or to cease his disturbance, and if plaintiff sustained any injury or damage, it was occasioned by plaintiff's first unlawfully threatening to do bodily harm to and assaulting the defendants Lucille Carroll and William Carroll, while defendant Lucille Carroll was peaceably attending to her own affairs and while defendant William Carroll was in the quiet and lawful discharge of his duties as bartender in complete charge of the said Cock-tail Lounge.

V.

Defendants deny each and every allegation contained in paragraph VII of plaintiff's complaint.

Defendants allege that immediately following the insane attack on defendant William Carroll by the plaintiff, as alleged aforesaid, plaintiff became so uncontrollably violent, that both defendant Lucille

Carroll and defendant William Carroll were brutally attacked by plaintiff; that plaintiff beat the defendant William Carroll about the face and body, smashed defendant William Carroll's glasses while over his eyes; that plaintiff [11] threw the defendant Lucille Carroll on the floor and kicked her in the ribs and other parts of her body until she was unconscious, and thereafter continued to kick and maul her with the most horrible violence.

That during plaintiff's attack on defendant William Carroll and his wife, the defendant Lucille Carroll, defendant Annetta Novick left the store adjoining the Cocktail Lounge and hurried to the scene of plaintiff's attack on the defendants Carroll; that defendant Novick found defendant Lucille Carroll unconscious and endeavored to remove her from plaintiff's reach; that defendant was bleeding all over her face from the brutal beating given her by plaintiff, her former husband; and that the defendant Annetta Novick did not then or any other time, so much as touch the plaintiff, but only made every effort to persuade him to cease beating the defendants so mercilessly.

VI.

Defendants deny each and every allegation contained in paragraph VIII of plaintiff's complaint.

VII.

Defendants deny the allegations contained in paragraph IX of plaintiff's complaint, and especially deny that plaintiff has sustained any injury to his ankle, or otherwise suffered from any injury

as a result of his attack on defendants Lucille Carroll and William Carroll in the cocktail lounge aforesaid; and in this respect defendants allege that when plaintiff was arrested for the noise and disturbance that he was creating in said cocktail lounge, he was so wild and violent that the arresting officer required considerable assistance in the performance of his duty; that plaintiff was angrily and wildly kicking at every person and object within his reach. [12]

VIII.

Defendants deny the allegations contained in paragraph X of plaintiff's complaint.

IX.

Defendants have no knowledge of the matters contained in paragraph XI of plaintiff's complaint, and therefore deny all the allegations therein contained.

X.

Defendants deny the matters contained in paragraph XII of plaintiff's complaint, and allege that if plaintiff sustained any injuries, either as a result of his wild attack on the defendant William Carroll or the defendant Lucille Carroll, or as a result of his violent behavior after being forcibly removed from the cocktail lounge of defendants Novick, his willful neglect of same is hardly the fault of defendants.

Defendants allege that some of the injuries inflicted upon defendants Lucille Carroll and William Carroll by the said plaintiff may be permanent in nature.

Defendants deny that plaintiff suffered any indignities or humiliation at the hands of defendants, or either of them, and that the charges made by plaintiff in respect thereto are stupid, ridiculous, and insulting to the intelligence of any person reading the same.

XI.

Defendants deny the matters contained in paragraph XIII of plaintiff's complaint, and further

could not REB

allege that the plaintiff ~~cannot~~ possibly have been guided or prompted by reason and good judgment in REB

~~and~~ making so false and malicious an allegation as to [13] suggest the defendants responsible in any manner whatsoever for the outcome of his insanely jealous and violent display of temper; that plaintiff commenced and provoked the disturbance above mentioned, compelled the defendants Lucille Carroll and William Carroll to defend themselves against plaintiff's attacks; inflicted severe injury to defendants Lucille Carroll and William Carroll, that plaintiff knew that defendant William Novick was not even near the premises where plaintiff instigated his attacks, and that Annetta Novick pleaded with plaintiff to cease and desist from his brutal violence.

Wherefore defendants pray that the plaintiff's complaint be dismissed, that he be reprimanded for the insolence of his allegations and his utter, brazen disregard of the proprieties and common decencies of mankind.

/s/ R. E. BAUMGARTNER,

Attorney for Defendants. [14]

United States of America,
Territory of Alaska—ss.

William H. Novick, being first duly sworn, says he is one of the defendants in the above-entitled action and joins in the foregoing answer; that he has read said answer and that the facts and statements contained in said answer and defense are true to his own knowledge and belief; and does further say that he is materially interested in the said action and in the establishment of the foregoing defense thereto.

/s/ WM. H. NOVICK.

Sworn to and subscribed before me this 30th January, 1947.

[Seal] /s/ R. E. BAUMGARTNER,
Notary Public for Alaska.

Comm. exp. 17th Sept., 1947.

[Endorsed]: Filed Jan. 31, 1947. [15]

[Title of District Court and Cause.]

REPLY

Comes now Anson E. Gouldsberry, the plaintiff in the above entitled action, and by way of Reply to defendants' Answer, plaintiff denies each and all of the allegations of such Answer which are in conflict with the allegations of plaintiff's Complaint.

Wherefore, plaintiff having fully replied to defendants' Answer prays for judgment in this matter according to the prayer contained in plaintiff's Complaint.

DAVIS & RENFREW,
By /s/ EDWARD V. DAVIS,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska—ss.

Edward V. Davis, being first duly sworn, upon his oath, deposes and says:

That I am one of the attorneys for the plaintiff in the above-entitled action; that I make this verification for and on behalf of said plaintiff for the reason that said plaintiff is [16] not now present at the place where this verification is made, to wit: Anchorage, Alaska; that I have read the within and foregoing Reply, know the contents thereof, and that the matters and facts therein stated are true as I verily believe.

/s/ EDWARD V. DAVIS.

Subscribed and sworn to before me this 8th day of February, 1947.

[Seal] /s/ MARY E. FASNACHT,
Notary Public in and for the Territory of Alaska.

My comm. expires: 10/19/47.

[Endorsed]: Filed Feb. 13, 1947. [17]

In the District Court for the Territory of Alaska,
Third Division

No. S-4337

ANSON E. GOULDSBERRY,

Plaintiff,

vs.

WILLIAM H. NOVICK, ANNETTA NOVICK,
WILLIAM CARROLL and LUCILLE CAR-
ROLL,

Defendants.

VERDICT No. 1

We, the jury, duly selected, impaneled and sworn to try the above-entitled cause, do find for the plaintiff and against all of the defendants, and find that the plaintiff is entitled to recover from the defendants and each of them as compensatory damages the sum of \$2500 00/100; and we further find that the plaintiff is entitled to recover of and from each of the defendants as punitive damages the sum of \$1000 00/100.

Dated at Seward, Alaska, this 27th day of March, 1947.

/s/ H. W. CAMPEN,
Foreman.

Entered Court Journal No. G14, Page No. 158,
March 27, 1947.

[Endorsed]: Filed March 27, 1947. [31]

In the District Court for the Territory of Alaska,
Third Division

No. 4337

ANSON E. GOULDSBERRY,

Plaintiff,

vs.

WILLIAM N. NOVICK, ANNETTA NOVICK,
WILLIAM CARROLL and LUCILLE CAR-
ROLL,

Defendants.

JUDGMENT

The above-entitled action came on regularly for trial on the 26th day of March, 1947, before the above-entitled Court at Seward, Alaska, the plaintiff appearing in person and represented by Edward V. Davis, of his counsel, and the defendants, William H. Novick, Annetta Novick, and Lucille Carroll, appearing in person and represented by their attorney, R. E. Baumgartner, the defendant William Carroll not appearing in person but represented by R. E. Baumgartner, his attorney. A jury of twelve persons was regularly empaneled and sworn to try the cause, witnesses on behalf of the plaintiff and of the defendant were sworn and examined and evidence both oral and documentary was admitted by the Court. After hearing the evidence, the arguments of counsel and the instructions of the Court the jury retired to consider their verdict and subsequently returned into Court and rendered a verdict in favor of the plaintiff as follows:

“We, the jury, duly selected, impaneled and sworn to try the above-entitled cause, do find for the plaintiff and against all of the defendants, [74] and find that the plaintiff is entitled to recover from the defendants and each of them as compensatory damages the sum of \$2500.00; and we further find that the plaintiff is entitled to recover of and from each of the defendants as punitive damages the sum of \$1000.00.”

Wherefore, by virtue of the law and by reason of the premises aforesaid, It Is Hereby Ordered, Adjudged and Decreed that Anson E. Gouldsberry, the plaintiff, have and recover of and from the four defendants, jointly and severally, the sum of \$2500.00 as compensatory damages, together with the sum of \$1,000.00 as punitive damages and together with his costs and disbursements in this action incurred to be taxed by the Court in the manner provided by law.

Seward

Dated at Anchorage, Alaska, this 30th day of June
April, 1947.

/s/ ANTHONY J. DIMOND,
District Judge.

Entered Court Journal No. G14, Page No. 382,
June 30, 1947.

[Endorsed]: Filed June 30, 1947.

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF
APPEAL

The above-named defendants, William H. Novick and Annetta Novick, conceiving themselves aggrieved by the judgment made and entered on the 30th day of June, 1947, in the above-entitled cause, wherein and whereby judgment was rendered in favor of the Plaintiff and against said defendants in the sum of Three Thousand Five Hundred Dollars (\$3,500.00), together with plaintiff's costs and disbursements incurred in said action, do hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and said defendants pray that the appeal be allowed; that a citation may issue herein; and that a transcript of the record proceedings and papers in said cause be sent to the said Appellate Court.

Petitioners further pray that a supersedeas may be granted herein pending a final disposition of the cause upon the defendants filing a supersedeas and cost bond in such amount as may be fixed by the order allowing the appeal.

Dated September 15, 1947.

: /s/ GEORGE B. GRIGSBY,

Attorney for Defendants.

Service Admitted Sept. 15th, 1947.

.....,

Attorneys for Plaintiff. [76]

[Endorsed]: Filed Sept. 15, 1947. [77]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND
SUPERSEDEAS

The petition of William H. Novick and Annetta Novick, defendants in the above-entitled cause, for an appeal from the final judgment rendered therein, is hereby granted and the appeal is allowed, and upon the petitioners filing a bond in the sum of Four Thousand Dollars (\$4,000.00), with sufficient sureties and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered in the above cause, and shall suspend and stay all further proceedings in this Court until the termination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, September 15, 1947.

/s/ ANTHONY J. DIMOND,
District Judge.

Entered Court Journal No. G15, Page No. 111,
Sept. 15, 1947.

[Endorsed]: Filed Sept. 15, 1947. [78]

[Title of District Court and Cause.]

CITATION ON APPEAL

To the Plaintiff, Anson E. Gouldsberry, and to His
Attorneys, Davis and Renfrew:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, forty (40) days from the date of this citation, pursuant to the Order Allowing Appeal on file in the office of the Clerk of the District Court for the Territory of Alaska, Third Division, in that certain action pending in said District Court entitled Anson E. Gouldsberry, Plaintiff, vs. William H. Novick, Annetta Novick, William Carroll and Lucille Carroll, Defendants, being No. S-4337, in the files of said District Court, and wherein the said William H. Novick and Annetta Novick are appellants, and Anson E. Gouldsberry is appellee, to show cause, if any there be, why the judgment rendered against the said William H. Novick and Annetta Novick should not be corrected and why speedy justice should not be done to the parties in the premises in that behalf. [79]

Witnessed by the Honorable Anthony J. Dimond, Judge of the District Court for the Territory of Alaska, Third Division, this 15th day of September, 1947.

/s/ ANTHONY J. DIMOND,
Judge.

Service admitted September 15, 1947.

.....,
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 15, 1947. [80]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now Comes the defendants and appellants herein, William H. Novick and Annetta Novick, and file the following Assignment of Errors upon which they will rely in the prosecution of their appeal to the United States Circuit Court of Appeals for The Ninth Circuit, from the final judgment made and entered in this cause on the 30th day of June, 1947, by the above-entitled Court.

I.

That the Court erred in overruling the motion of the defendants, William H. Novick and Annetta Novick, and Lucille Carroll, made after both sides had rested, that the Court direct the jury to return a verdict in favor of said defendants, said motion being based upon the ground that there was insufficient evidence to go to the jury to justify a verdict in favor of the plaintiff and against said defendants, to which ruling the defendants excepted and the exception was allowed.

II.

Error of the Court and abuse of discretion in overruling the motion for a new trial, said motion being based upon the following grounds: [81]

- (A) Said verdict resulted in part from accident or surprise which ordinary prudence could not have guarded against.

- (B) Newly discovered evidence material for the defendants, which they could not, with reasonable diligence, have discovered and produced at the trial.
- (C) That the verdict of the jury was for excessive damages appearing to have been given under the influence of passion or prejudice.
- (D) That there was an insufficiency of the evidence to justify the verdict against the defendants.

III.

That the Court erred in instructing the jury as follows:

“An employer may be liable for the acts of employees resulting in injury to another person where the employee, in committing such injury, was acting within the scope of his employment and in the line of his duties while engaged in such employment, or if the employer ratified the act of his employee causing the injury to such other person.

“If, in this case, you find from a preponderance of the evidence, that defendant William Carroll committed an unlawful assault and battery upon the plaintiff and that, in committing such assault and battery, the defendant, William Carroll, was acting within the scope of his employment and in the line of his duties while engaged in such employment, or if you find that such unlawful assault and battery was committed by defendant, William Carroll, and

that the defendants William H. Novick and Annetta Novick or either of them, ratified the act of the defendant, William Carroll, in [82] assaulting and beating the plaintiff, then the defendants, William H. Novick and Annetta Novick, may be held in damages, as follows:

* * * * *

“In this connection, you may consider and give such weight as you think proper to the testimony received in the trial of the case relative to the continued employment of defendant William Carroll by defendants William H. Novick and Annetta Novick, subsequent to July 5, 1946, the testimony of the alleged signing of criminal complaints against the plaintiff by defendants William H. Novick and Annetta Novick on or after July 5, 1946.”

IV.

That the Court erred in refusing to instruct the jury as requested by the defendants, as follows:

Defendants' Requested Instruction No. 1

The Court instructs you that the law is the master, in this case Mr. and Mrs. Novick, is not responsible for the acts of the servant, in this case William Carroll, done outside of the masters' business and to accomplish some end personal to the servant himself; that the law does not imply any authority from the master to the servant to commit an assault upon a person who is not injuring or threatening to injure the master's property, and who is not interfering with the servant's performance of his duty to the master; and if, in this case, you be-

lieve from the evidence, that the defendant William Carroll struck the plaintiff Anson E. Gouldsberry for some reason or purpose of his own, the plaintiff cannot recover in this case from the defendants William Novick and Annetta Novick, and your [83] verdict must be for the defendants William Novick and Annetta Novick; to which ruling defendants excepted and exception was allowed.

V.

That the Court erred in refusing to instruct the jury as requested by defendants as follows:

Defendants' Requested Instruction No. 2

The jury is instructed that the outcome of any altercation of an employee with others, resulting from an assault and battery precipitated by matters and things having nothing to do with the duties and employment of such employee, is not within the scope of the employment of such employee, and the employers cannot be held accountable therefor; that if the defendant William Carroll had any kind of personal quarrel with the plaintiff Gouldsberry, in or upon the premises of the defendants William Novick and Annetta Novick, and such quarrel resulted in injury or damage to the plaintiff Anson E. Gouldsberry, then the defendants William Novick and Annetta Novick cannot be held responsible, or liable therefor, unless it is shown by the evidence that the employers William Novick and Annetta Novick actually participated in the quarrel, argument or fight, or encouraged or aided the employee Carroll; to which ruling defendants excepted and exception was allowed.

VI.

That the Court erred in refusing to instruct the jury as requested by defendants, as follows:

Defendants' Requested Instruction No. 3

The jury is instructed, that if it is reasonably satisfied from the evidence on this trial that the plaintiff Anson E. [84] Gouldsberry made threats to do harm to the defendant William Carroll, and if in fact the plaintiff Anson E. Gouldsberry carried out his threats by assaulting the defendant William Carroll, who was at the time an employee of the defendants William A. Novick and Annetta Novick; and the defendant, in resisting the attack of the plaintiff Anson E. Gouldsberry, caused the plaintiff Gouldsberry any injury, then the defendant Carroll cannot be held liable therefor, and the defendants Novick, Carroll's employers, can in no manner be held responsible or liable for any injury or damage to the plaintiff Anson E. Gouldsberry; to which ruling defendants excepted and exception was allowed.

VII.

That the Court erred in refusing to instruct the jury as requested by defendants, as follows:

Defendants' Requested Instruction No. 4

The jury is instructed that the proprietor of any place of business, has the right to remove any person therefrom if such person is conducting himself in a disorderly manner; that in this case, either Mr. or Mrs. Novick, or their employee, Mr. Carroll, had the right, and it was their duty, to cause the plaintiff to be removed, by force if necessary, from

the bar or cocktail lounge, if, from the evidence, the plaintiff Gouldsberry was conducting himself in a manner not conducive to peace and good order, and if the plaintiff was making a disturbance likely to cause injury or damage to persons or property in or upon the premises of the Novicks; to which ruling defendants excepted and exception was allowed.

VIII.

That the Court erred in refusing to instruct the jury as requested by defendants, as follows:

Defendants' Requested Instruction No. 5

The jury are charged that if they shall be reasonably satisfied from the evidence that the alleged assault and battery by Carroll upon the plaintiff in the case arose out of a personal dispute between the plaintiff and the said Carroll, they must find a verdict for the defendants, notwithstanding the fact that Carroll was in the employ of the defendant Novick at the time of the alleged assault, unless they shall be reasonably satisfied that defendant authorized or participated in such act; to which ruling defendants excepted and exception was allowed.

Wherefore defendants and appellants pray that the judgment in the above-entitled cause be reversed and the cause remanded, with instructions to the trial court as to further proceedings therein and for such other and further relief as may be just in the premises. /s/ GEORGE B. GRIGSBY,
Attorney for Defendants.

Service admitted Sept. 15th, 1947.

.....
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 15, 1947. [86]

[Title of District Court and Cause.]

Minute Order

EXTENDING TIME TO DOCKET CASE IN
CIRCUIT COURT OF APPEALS

Now at this time upon motion of George B. Grigsby, counsel for defendants.

It Is Ordered that defendants, by and through their counsel, have and are hereby granted 75 days within which to docket cause No. S-4337, entitled Anson E. Gouldsberry, plaintiff, versus William H. Novick, Annetta Novick, William Carroll and Lucille Carroll, defendants, with the Circuit Court of Appeals for the Ninth Circuit.

Entered Court Journal No. G15, Page No. 111.
Sept. 15, 1947. [87]

[Title of District Court and Cause.]

Minute Order

EXENDING TIME TO FILE AND DOCKET
CASE WITH CIRCUIT COURT OF
APPEALS

Now at this time on motion of George B. Grigsby, counsel for defendants,

It Is Ordered that the defendants in cause No. S-4337, entitled Anson E. Gouldsberry, plaintiff, versus William H. Novick, Annetta Novick, William Carroll, and Lucille Carroll, defendants, be, and they are hereby, granted additional thirty days within which to file and docket cause with Circuit Court of Appeals.

Entered Court Journal No. G15, Page No. 181,
Oct. 20, 1947. [88]

[Title of District Court and Cause.]

Minute Order

GRANTING ADDITIONAL TIME WITHIN WHICH TO DOCKET CAUSE WITH CIRCUIT COURT OF APPEALS

Now at this time upon motion of George B. Grigsby, of counsel for defendants,

It Is Ordered that the defendants in cause No. S-4337, entitled Anson E. Gouldsberry, plaintiff, versus William H. Novick, Annetta Novick, William Carroll and Lucille Carrol, defendants, be, and they are hereby, given 30 additional days within which to docket cause with the Circuit Court of Appeals.

Entered Court Journal No. G15, Page No. 316, Dec. 5, 1947. [89]

[Title of District Court and Cause.]

Minute Order

EXTENDING TIME WITHIN WHICH TO DOCKET CASE IN CIRCUIT COURT OF APPEALS.

Now at this time upon motion of George B. Grigsby, of counsel for defendants,

It Is Ordered that extension of time to March 1, 1948, be, and it is hereby granted to defendants within which to docket cause No. A-4337, entitled Anson E. Gouldsberry, plaintiff, versus William H. Novick, Annetta Novick, William Carroll and Lucille Carroll, defendants, in Circuit Court of Appeals.

Entered Court Journal No. G 6, Page 2, Jan. 16, 1948. [90]

In the District Court for the Territory of Alaska,
Third Division
No. S-4337

ANSON E. GOULDSBERRY,

Plaintiff,

vs.

**WILLIAM H. NOVICK, ANNETTA NOVICK,
WILLIAM CARROLL and LUCILLE
CARROLL,**

Defendants.

BILL OF EXCEPTIONS

Be It Remembered:

The above cause came on regularly for trial on Wednesday, March 26, 1947, before the Honorable Anthony J. Dimond, Judge of the above-entitled court, at Seward, Alaska, the plaintiff appearing in person and by his attorney, E. V. Davis, the defendants appearing in person, and by their attorney, R. E. Baumgartner, and the following proceedings were had.

A jury having been duly impaneled and sworn.

ANSON E. GOULDSBERRY

the plaintiff, being first duly sworn, testified in his own behalf as follows:

Direct Examination

By Mr. Davis:

My name is Anson E. Gouldsberry. I live at Seward, Alaska, on Fourth Street. I have lived there ten years, in April. I am a longshoreman and

(Testimony of Anson E. Gouldsberry.)

do most anything I can to make an honest living. I worked in a mine for two years up at Crown Point, Mile 26. Most of the time I have been working as longshoreman. I am the plaintiff in this action. I remember the 5th day of July, 1946. On the evening of that day, I was home until about 9:30 and I had a chicken [91] and I put it on the stove and turned the fire up and came down-town to see some friends of mine and I looked around town and didn't find them. I happened to walk into Novick's Bar and there was some friends of mine in there and I offered to buy one of them a drink and he said: "No I am going home." And so I spoke to Bill Carroll and congratulated him and shook hands with him and bought him a drink and bought his wife a drink.

There was present at the time I was in there, in the bar, besides Mr. Carroll, a fellow by the name of Freckman, but he walked out shortly after; Charlie Ottoson, Charlie Peterson and Mr. and Mrs. Carroll and Mrs. Novick was the only ones I knew in there at the time.

I sat down to the bar and I said, "Give me a bottle of beer" and Mr. Carroll bought me a bottle of beer and then I congratulated him and shook hands like I should and I said, "have a drink," and he said "No, I am not drinking. I will take a coca cola." I said, "That is okay, have one." And I laid my money on the bar and he said, "Jimmie is sitting down there," which is his wife. I said "All right, give her a drink too." Jimmie was my ex-wife. I am not sure when we were divorced. I

(Testimony of Anson E. Gouldsberry.)
think it was in May, sometime. She got the divorce.
I didn't know it. It was in 1946.

And so I set there to the bar and had a drink out of the bottle and I had the little dog on my lap and Charlie Ottoson came over and said, "How old is the dog?" I said: "I don't know. Jimmie remembers when they were born. She can tell you maybe." She said, "They were born in January." I said: "Well they are about six months old, then." So I sit there and didn't say anything and she said: "All these lies people tell about me is not so." I said: "Well, I don't care." And so she started to talking and she got excited and she raised her voice—loud. And so I said: "Well, I don't suppose [92] you bought another man a bathrobe and I had to pay for it." Just then a bottle hit me in the face and I got this cut and I was knocked to the floor—and I had blood in my eyes and mouth and the next thing I knew I was being dragged or throwed to the door and then Mr. Kerestine, the Chief of Police, came along and took me out of inside the door.

It was Carroll who hit me with the bottle,—Bill Carroll—from behind the bar. He jerked it out of my hand. I didn't give him any cause to hit me with that bottle that I know of. I was not making a nuisance of myself that I know of. I was acting like a gentleman when I was in there. After I was on the floor, I felt something beating on me and I twisted and turned and kicked and fought to get up and protect myself.

Q. Do you know who it was that was on you at that time?

(Testimony of Anson E. Gouldsberry.)

A. At that time? Well, I was knocked unconsciously. (Witness continues.) Mrs. Novick was there at the bar when I offered to buy her and Charlie Ottoson and Carroll a drink. Whether I did or not, I can't recollect—whether she accepted a drink or not. But I know I did buy Ottoson and Mr. and Mrs. Carroll a drink. When I come to and was near the door I know that Mrs. Novick had her hands on my shoulders shoving on me to the door. She told me to get out and shut up. I sat about four or five stools from the lower end of the bar. Mrs. Carroll was sitting at the end of the bar. Mrs. Novick was standing at the end of the bar. She was right next to Mrs. Carroll. Charlie Ottoson was sitting next to Mrs. Carroll toward the front door of the place. Mrs. Carroll was near the back end of the bar away from the entrance door of the place. I don't know whether Mr. Carroll took part of this scuffle on the floor,—after I was knocked out, I don't know. I couldn't say that he was there or who was beating on me. I did receive injuries as a result of this. I have got a cut here and my lip was cut and [93] I was all blood and had a broken ankle in my leg. And I was taken to the jail after that. Pete Kerestine, the Chief of Police, took me over and put me in jail and searched me and when I was standing there with my arms up like that, he stuck his hands in my pocket and kind of throwed me off balance, and I stepped to catch my balance and he grabbed me and jerked me and shook me and said: "Stand still when I am searching you or I will hang one on you." Naturally, any-

(Testimony of Anson E. Gouldsberry.)

one is going to be shoved off balance when they are ramming their hands in your pockets. And I was put in there—didn't have no drinking water, no sanitary conditions—blankets. I was cold and wet, and I was cold—suffered all night. I laid there bleeding all night. I was still bleeding at the time I was put in jail. Nothing at all was done to take care of my cuts. Nothing done to take care of my foot. There was nobody around there at all. I was locked up until the next morning—Saturday morning—until around ten o'clock. Mrs. Novick had a complaint against me that I had her on the floor beating her, and Mr. and Mrs. Carroll had a complaint against me, and I didn't plead guilty to them because I was not guilty of what they had me charged with. Then I went on bond—Moser came and went on my bonds and they turned me out. I got out on bail Saturday, about 11 o'clock. That was about 12 hours after I had been put in jail. When I first went in I asked to be allowed to make bail, and go home and he said: "No, everybody is in bed. You will have to stay here tonight," and he walked away and left me. I mean by "he," the Chief of Police, Mr. Kerestine.

When I was released on bail on Saturday morning, I went home. I went to the bank and got some money to go to Anchorage, on because I was not going to pay something that I didn't owe, and I asked Pete if [94] I could get extension on it until Monday morning and he said no, it was up to the Court. And I said who was the Court, and he said:

(Testimony of Anson E. Gouldsberry.)

“Go to the City Hall.” I went over and asked Mr. Howe, who was the Clerk here, for an extension of time, and he refused me. And I had 20 minutes to catch the plane to go to Anchorage, and I went home and washed the blood off my face and changed shirts and caught the plane and went to Anchorage. And it was Saturday afternoon and there was nobody open. I couldn’t get no counsel up there—only I had—I got Ellis and I paid him and he told me to go back to Seward—“everything is all right.” He said he called up down here. He said: “Go back to Seward. If there is anything,” he said “I will be down.” And then Monday morning I got back here. I was in the hospital. Dr. Bannister took X-ray of my foot, and before it was dressed Mr. Kerestine, the Chief of Police, and the City Clerk was over there and took me out of the hospital before my foot was dressed or anything. I just had a sock on my foot, and I came over on crutches. And when they—I didn’t know when I went back to the hospital that I had 75 days in jail or \$150 fine until I was being discharged out of the hospital, and I told the nurse to call the Chief of Police, that I was being discharged from the hospital, and he was over there after me before I had my clothes on. I thought he was going to take me home. Instead he took me to the fire hall and I said: “How long have I got to put in here, Pete?” He said: “75 days.” That’s the first I knew of it because when the court was dismissed he didn’t tell me I had a \$150 fine to pay for 75 days in jail. That’s the first I knew of it.

(Testimony of Anson E. Gouldsberry.)

I guess you would call it a trial that he had on Monday morning. I tried to make a defense at that time and they wouldn't let me talk. Mr. Kerestine, the Chief of Police, told me to shut up my face and not beat my gums so much so I wouldn't say nothing. [95] Mr. Novick was there on Monday morning. He didn't have anything to say regarding this case but after the case was over and just Mr. Kerestine and myself was there, he wanted to know—he said: "What's the matter with you, Gouldsberry, are you crazy? If I had been there I would have broke your God damn neck," and I started to say something and he made me shut up and I didn't say nothin. I shut up, see?

As a result of this fracas over in the bar, I did suffer injuries. I suffered a broken leg—ankle—and a cut on my face, and bruises all over my body and on my knee here. The mark is still there yet. I underwent hospitalization as a result of my injuries. An X-ray was taken. My hospital bill for the injuries received was \$35. I had a doctor bill of \$52.50. My regular employment and job at the time in question was longshoreman, and during the time in question, along in July—August, thereabouts, 1946—I earned around 750 to 800 a month. As a result of my injuries I was not able to work after this fracas. I didn't work. I didn't start to work until December to amount to anything—only little odd jobs I had to make a living—I didn't have no income to amount to anything. I had to pay out money for fine and I don't know what that was for.

(Testimony of Anson E. Gouldsberry.)

I was kept from my regular employment as a result of my injuries there. I couldn't work for at least three months. I did a little work around town and a little around home but my ankle bothered me all the time and it still bothers me. I didn't have any regular employment at all, longshoring or otherwise during the time that I was laid up with my ankle. I didn't do anything. My leg still bothers me. I was to the doctor a few days ago with it and he told me that it would bother me for quite a little while. My knee is healed over, yes. It was all skinned up. I still carry a scar on that knee. I have a scar on my face. I lost over \$2000—2500, [96] anyway—in wages alone. I have already told about my doctor and hospital bills. I did suffer pain from the effect of these injuries. At times, my leg still bothers me. I have never been in jail before—for nothing—never paid a fine. First time I was ever in jail. I was embarrassed by being put in jail. I didn't figure that being put in jail was my fault. I don't know why I should go to jail. I wasn't guilty of anything. If I would have been guilty I would have said it was my own fault and paid my fine and pled guilty. I have always made a habit of paying my bills and being honest and I still think it is the best policy. I was not in the habit of going into Novick's bar and making a nuisance of myself. I never was in there before—only to buy a package of cigarettes and go out. I was not trying to make a nuisance of myself towards the ex-Mrs. Gouldsberry or toward her then husband, William Carroll. If I had I would have contested the divorce in the first place.

(Testimony of Anson E. Gouldsberry.)

Cross-Examination

By Mr. Baumgartner:

It is not a fact that I almost contested this divorce. I have got some mining claims around the country and she said she would sign them if I would bring them down. I brought them down didn't I? The lease for the mining claims—and she said if I would give her the washing machine she would sign these claims over and I said: "Well, she has got all she will get there. We will just let it go the way it is." Didn't I come in and ask you, Mr. Baumgartner if she got the divorce and ask you for a copy and said if she don't get it I am going to Anchorage and—

The Court: Do not ask Counsel any questions. You answer questions.

(Witness continuing. Questions by Mr. Baumgartner; answers by Mr. Gouldsberry.)

Q. Now, Mr. Gouldsberry, did you get along very well with Mr. Carroll?

A. Did I get along with him?

Q. Yes?

A. As far as [97] I know, yes.

Q. You liked him?

A. I had no hate against him. I like everybody.

Q. Oh—Isn't it a fact that you threatened to kill him? A. No I did not.

(Testimony of Anson E. Gouldsberry.)

Q. Isn't it a fact that you accosted Mr. Carroll once previously on the street and threatened him?

A. Yes, I can explain that to you if you wish me to.

Q. Yes, go ahead?

A. All right—yes, I did. Show me any man in this town—

Mr. Davis: Don't argue now, Mr. Gouldsberry—just tell your story.

Mr. Gouldsberry: All right. I was coming down to go to work on the boat one evening to see if I should be there the next morning. My wife was still married to me then—wasn't divorced then. Her and Carroll was standing on the street, loving and rubbing together. I grabbed him by the collar and slapped him over. Anybody that wouldn't do that—would you do that—

The Court: Do not ask questions.

Mr. Baumgartner: Well, Mr. Gouldsberry, in spite of this you said you like everybody? You like Mr. Carroll?

A. I have nothing against anybody.

Q. Even after that? A. Yes.

Q. And you didn't ever strike him?

A. Did I ever strike him?

Q. Yes?

A. Yes, I slapped him on the street.

Q. After that? A. After that?

Q. After this incident?

A. Not that I ever know of. No sir, I didn't.

Q. Now, you say you never threatened his life?

A. That's right, I didn't.

(Testimony of Anson E. Gouldsberry.)

Q. Now, on this fifth of July when you came in here. You came in for the purpose of congratulating Mr. and Mrs. Carroll?

A. Into Novick's bar?

Q. Yes?

A. No, I figure it is a public place and I walked in there, and I was a gentleman, and looked for some friends of mine. And I think I had a perfect right to walk in there. Otherwise why shouldn't I have been told to stay out? I wasn't looking for trouble.

After I saw Mr. Carroll behind the bar I then congratulated him. I said: "How are you, Bill? Congratulations to you." And he said: "Thank you," and he reached his hand out and I shook hands with him. I first saw Jimmie—Mrs. Carroll—when he said: Jimmie is sitting at the end of the bar" and I said: "all right, [98] give her a drink." I was then sitting at the bar, 8 or 10 feet from where Mrs. Carroll was sitting. I didn't sit next to her at that time. I had moved over next to her when she said something about a wrist watch, and she said: "See?" And she told me, herself—congratulated me and said "Good luck," and I said "Good luck to you" and she said: "Thank you, I am very happy" and I said "Good." And I didn't make [99] further remarks about her to Mr. Carroll or anyone.

(Questions by Mr. Baumgartner; answers by Mr. Gouldsberry.)

(Testimony of Anson E. Gouldsberry.)

Q. And you didn't make further remarks about her to Mr. Carroll or anyone?

A. Not that I know of.

Q. But you might have?

A. No, I can say I didn't. I know what I said and done.

Q. You are positive you made no remarks?

A. No, I did not.

Q. No disrespectful remarks at all?

A. No.

Q. Then you say out of a clear sky, a bottle descended on you and knocked you unconscious.

A. I will tell you what I did say. This is not anything. But I did say that I didn't care what other people said—she told me about a lot of lies that people were telling—and I said: "well I don't care," and I did say: "I don't suppose you bought another man a bathrobe," and then a bottle hit me in the face.

Q. Then, you did make some other remarks then?

A. Not that I know of, no. I never made no bad remarks that I know of. If you call that a bad remark—

Q. And you say you are positive Mr. Carroll hurled this bottle at you?

A. Hit me with this bottle?

Q. Yes? A. Yes, yes.

Q. Did he throw it or—?

A. He grabbed it out of my hand and hit me in the face.

(Testimony of Anson E. Gouldsberry.)

Q. On which side of the face?

A. Right there—you can see the cut. You can see the scar.

Q. That is no indication a bottle hit you, Mr. Gouldsberry. A. It isn't:

Q. And after that you say you were knocked unconscious.

A. When that bottle hit me, I was knocked backwards off the stool on the floor on my back.

Q. Now, you testified you knew nothing else until you were dragged to the door and Mrs. Novick herself pushed you.

A. Until I got to the door and that's when she had ahold of me pushing me to put me out the door.

Q. All the interval between the time you were knocked unconscious and you were pushed to the door, you don't remember anything else?

A. Except the blood running in my face, and I twisted and turned to get up, yes.

Q. In your unconscious state, you remember that?

A. I didn't know exactly everything going on, but I do know that. I had blood in my eye and in my mouth and all over me. I do know that.

Q. And you know that while you were unconscious?

A. Well, naturally, you [100] wouldn't know exactly everything going on but you would know that. You would feel that.

Q. Mr. Gouldsberry, answer: Were you unconscious from the time this bottle struck you until you were up at the door being assisted out?

A. Partly unconscious yes.

(Testimony of Anson E. Gouldsberry.)

Q. Oh, partly, now—not entirely? A. No.

Q. Do you recall striking your wife—your ex-wife—at that time?

A. No, I do not. I might have—when I was laying on the floor and kicking to get up, I might have accidentally kicked her.

Q. You might have?

A. I might have accidental, but I never hit her purposely—I will say that. I never have.

Q. Well, Mr. Gouldsberry, did Mrs. Novick strike you?

A. I can't say that she struck me, no.

Q. But in your complaint, Mr. Gouldsberry, you allege that she struck and beat you about the body?

A. They had me on the floor beating on me.

Q. Oh, now she did?

A. Hammering on me—I don't say personally that she did it or who did it. But they had me on the floor beating on me.

Q. Well now, did she beat you or didn't she? Mr. Gouldsberry stick to your story.

A. I didn't say she did or didn't beat me. I said I was partly knocked unconscious, and I can't say she did or didn't beat me.

Q. Well, you couldn't say then, that she did could you?

A. I know she was pushing me pushing me to the door to put me out.

Q. Is that beating you?

A. No. Did I say she beat me?

(Testimony of Anson E. Gouldsberry.)

Q. Yes, Mr. Gouldsberry, you did. Now state to the jury whether she beat you or whether she didn't. Answer the question: Did Mrs. Novick beat you?

A. As I say I can't say that she did or didn't.

Q. You don't know, then?

A. I don't know exactly, no.

Q. And you don't know much exactly whoever else beat you while you were partially unconscious?

A. I don't. Well, I don't suppose anybody beat me, then—huh?

Q. I am not answering your questions, Mr. Gouldsberry. You don't seem to know what happened to you while you were partially unconscious, do you?

A. Yes, I do. I know I got a severe beating.

Q. That is all you know? You don't know whether by Dick Smith or Henry Jones, do you?

A. Well, I don't think they was in there that night.

Q. Did Mr. Novick beat you?

A. No, he did not.

Q. Who advised you to make him a defendant in this case? A. Who advised me?

A. Yes? A. Myself.

Q. Yourself advised you to make him a defendant in this case? Did you ever write any threatening letters to Mr. Carroll prior to this?

A. No, I never threatened anybody.

Q. Did you ever write any letters to Mr. Carroll at all complaining about your ex-wife, Mrs. Carroll?

A. Did I?

(Testimony of Anson E. Gouldsberry.)

Q. Yes? Produce it.

Q. I say, did you ever write any letters to anyone?

A. I will admit that, that I did in one way, because she threatened—and I got witnesses—she threatened to burn the home down out there where I live. So I did it, but I didn't threaten nobody.

Q. Mr. Gouldsberry, did you write any disrespectful letters, no. [102]

Q. Did you, *way* within a month or so—or say, during the time you and Mrs. Carroll were divorced, write any letters to her mother or to any other person complaining of her conduct or complaining of Mr. Carroll's reputation?

A. Answer "yes" or "no"?

Mr. Davis: Your Honor, that question is incompetent, irrelevant and immaterial—outside the *scope* of the issues of this case.

The Court: Objection is overruled. You may answer. [103]

Yes, I wrote her a letter. I wish to explain why I wrote the letter. I will answer that question. I got a letter too—and several of them. I wrote the letter complaining of the reputation because I have a letter that she wrote that I wouldn't support her or take her nowhere and I beat her up all the time, and I wrote to her mother to explain that I was no rat like she wrote in the letter to her mother, and claimed that I was. I did it to keep myself clear, that's all—to clear myself.

(Testimony of Anson E. Gouldsberry.)

(Questions by Mr. Baumgartner; answers by Mr. Gouldsberry.)

Q. And you explained to her mother who was the rat in the picture? A. No, I did not.

Q. You didn't mention her?

A. Sure, I mentioned her name, but I never said nothing bad against her.

Q. Did you mention Bill Carroll?

A. Did I? I sent her the clippings out of the paper about the marriage.

I didn't write to anyone immediately before the 5th of July—her mother or anyone else—stating to the effect that Bill Carroll was no good. I did not. I didn't say he was no good. I had a letter too, out there, and I wrote and told her what I did and what kind of a person that I was and if she didn't believe it she could find out from someone else.

After I was struck or someone struck me or a bottle was thrown at me, I was knocked backwards off the stool when the bottle hit me, knocked to the floor and injured my back and my vertebraes in my back. I was partly knocked out yes, until I started to feel something beating on me and blood running in my eyes, and I have got my shirt with the blood on it yet. When I fought to get up, yes, I fought to get up and anybody would fight too, for self-protection, and yes, I know there was three or four around me and one of them was the fellow that used to work in the second hand store down there—I don't know what his name was—big, heavy-set fel-

(Testimony of Anson E. Gouldsberry.)

low, he had ahold of me. I know who was beating me when I came partly to and was being taken to the door but when I was laying on the floor, as [104] I say, I don't know who was beating on me. Mrs. Novick had ahold of me. Nobody was striking me when they were taking me to the door. Yes, somebody was striking me when I was on the floor, when I become partly conscious.

Q. Who, Mr. Gouldsberry?

A. Mrs. Novick and Mrs. Carroll and the fellow who worked in the second hand store.

Q. They were striking you and beating you?

A. Yes, stomping on me and kicking me—I don't know what they were hitting me with.

Q. You remember that definitely now?

A. Yes, when I come to, when I was knocked out on the floor and I felt something beating on me and I seen who was around me—I did see them, yes. There was blood in my eyes. I couldn't see very well. I could see well enough to see that.

Redirect Examination

By Mr. Davis:

I didn't in this letter I wrote to Mrs. Carroll's mother, make any threats against Mr. Carroll. I never made any threats against him. I didn't go into Novick's bar that night looking for trouble with Mr. Carroll. I certainly wouldn't have took a little dog I think the world and all of in there with me. If I was looking for trouble I would have left my dog at home; or I wouldn't have put my supper on

(Testimony of Anson E. Gouldsberry.)

and turned the stove up and went away and left the fire in the house. I have never looked for trouble in this town or any town. I couldn't say who this second hand store man was employed by. I had seen him around the second hand store. I heard he was employed by Mr. Novick as a swamper in Novick's place. He was there at that time. There were 3 or 4 others around there at that time, that was Carroll, Mrs. Carroll, Mrs. Novick and the fellow in the second hand store. They was all around me when I was on the floor. [105]

And thereupon,

HENRY J. PALLAGE

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Davis:

My name is Henry J. Pallage. I live in Seward. Have lived in Seward close to 3 years. I know Mr. Gouldsberry, the plaintiff. I went down to the city jail on or about the 5th day of July, 1946, to see him—went down to pay his fine. I noticed his condition when I was there. He looked pretty bad. He had a very bad cut just on the side of his left eye, and his eye was black, and he was black and blue across there, and he had blue spots here and there, and he showed me his arm; and I noticed him limping around on one foot and I asked him what the trouble was, and he showed me his ankle was swelled

(Testimony of Henry J. Pallage.)

up and black and blue. He was in a little cell just off the side of the fire truck. The place looked pretty bad. It was not clean. It looked just terrible. It certainly did smell—very bad. I mentioned about the place smelling bad. I said: "It's a pretty tough place for a fellow to be." And I said I came down to pay his fine and I had been informed just a little while before he was in jail. I didn't know about it until one of the longshoremen stopped and told me at my house, so I went right down to pay the fine. I seen something on the floor that certainly looked like blood, yes, and on the side of the sort of bunk like that was there—looked like quite a bit of blood there. I don't know where the blood came from there. I seen Mr. Gouldsberry's clothes—his shirt and his tie down to his house. I didn't notice them in the jail.

And thereupon, the plaintiff rested his case and

JOSEPH M. HAMILTON

being first duly sworn, testified for and in behalf of the defendants as follows: [106]

Direct Examination

By Mr. Baumgartner:

My name is Joseph M. Hamilton. I have lived in Seward between 5 and 6 years. I know the plaintiff, in this case, Mr. Anson E. Gouldsberry. Have known him a little over a year or a year and a half. I recall this matter happening in the bar. I talked to Mr. Gouldsberry a month—I believe it was a month pre-

(Testimony of Joseph M. Hamilton.)

vious to that when I was working for Mr. Friede. Mr. Friede's place of business was right across the street from where Mr. Gouldsberry lives. At that time, Mr. Gouldsberry made a statement to me in regard to Mr. Carroll. He made many threats about what he was going to do. I don't recall any words that he used. I didn't pay much attention. I know he made a lot of statements about Mr. Carroll and his wife, Jimmie. He made threats about going to get the marshal to arrest Jimmie on some charges, and he said: "Better yet, I think I will do it myself." He made quite a few threats of injury. The one I just mentioned is one. I wouldn't say that he threatened to kill Mr. Carroll but he did make quite a few drastic statements. I would gather from those statements that he made some time prior to the 5th of July that Mr. Gouldsberry had intended to do harm to Mr. Carroll.

Cross-Examination

By Mr. Davis:

I have lived in Seward between 5 and 6 years. I have known Mr. Gouldsberry about a year and a half. That would put it back, somewhere the first of the year, 1946, or maybe just a little earlier, somewhere in there. I met Mr. Gouldsberry—where I got to know him quite well was at Friede's garage when I worked on his car. In fact, I replaced the valves in his car and re-seated the valves and guided him through his whole engine. I mean Mr. Gouldsberry's. I was working for Friede and worked on his car and helped guide him. It was on valve work

(Testimony of Joseph M. Hamilton.)

and he didn't have the equipment, and I did the valve work for it. The time this happened was shortly after their divorce, [107] I believe, and when he was making the statements. It could not have been before the divorce, it was after the divorce. Well, I don't know whether it was before or after the divorce. It was during the time I worked at Friede's garage. It was in June. I worked for Friede, I believe, three months—June, July and—June, July, and August, I believe. I have heard conversations on both sides about this altercation or trouble that Mr. Gouldsberry was in with Mr. Carroll and didn't pay too much attention to it. Mr. Gouldsberry's conversation was something to the effect that he thought he would get the marshal after Mrs. Gouldsberry, or better yet, do it himself. And from that, I gathered that he was talking about bodily harm against Mr. Carroll.

Redirect Examination

By Mr. Baumgartner:

Mr. Gouldsberry did definitely threaten to do injury to Mr. Carroll. One statement was—let's see—he came in raving one morning and Mr. Friede, I believe, had been out the night before and he told Mr. Gouldsberry to take his troubles home with him, we had heard enough of him. We had been pestered, I believe, about two weeks. He did this repeatedly.

Recross-Examination

By Mr. Davis:

(Answer by Joseph M. Hamilton.)

I don't know whether this conversation was before or after the divorce—

And thereupon,

PATRICK J. FRIEDE

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is Patrick J. Friede. I have been a resident of Seward [108] going on five years. I have a garage and cab business here in Seward. My garage is located on the alley between 3rd and 4th streets. I know the plaintiff in this case, Mr. Anson E. Gouldsberry, very well. He lives right across the street from where my garage business is located. He is a neighbor of mine. Mr. Gouldsberry has been over in the garage several different times, not only prior to the 5th of July, 1946, but after the 5th. He was over there 2 or 3 different times during the month of July. I couldn't say exactly what day it was on, but he mentioned about his wife and about Bill Carroll and I just—well, in fact, he last time he talked about it I got tired of listening to it and I told him the best thing for him to do was forget about it or he was going to get himself in trouble. I don't know about his threat to do injury to Mr. Carroll. He was awfully mad and said he was going to have him arrested—oh, then he said that he should go up and kick hell out of Bill Carroll or kill him. This was along in June some time. I don't know exactly what day it was. My mechanic, Mr. Hamilton, was present during this conversation.

(Testimony of Patrick J. Friede.)

This was said to me by Mr. Gouldsberry in the presence of Max Hamilton. We were standing at the end of the bench and Max was working, doing something, and whatever he had he had in a vise, and I just—oh, I had walked away from Mr. Gouldsberry and then come back, and finally I threw up my hands and said: “The best thing for you to do is to forget about it or you are going to get yourself in trouble.” This was some time in June—I don’t know what day it was.

Cross-Examination

By Mr. Davis:

Q. Mr. Friede, you say that he talked to you both before and after the fifth of July, and that the last time you told him to forget it, go on home, or he might get in trouble?

A. I didn’t say he talked to me. I said he had been in the garage before and after the fifth of July.

As far as his conversations with me prior to the fifth of July, they were all in regards to his wife and Mr. Carroll. He said something about he was going to have him [109] arrested and he ought to go up and kick hell out of him and ought to kill him. I don’t know whether he said he was going to in those plain words or not. The way I figure he was mad because his wife left him, I guess. I don’t know whether these conversations was before or after the divorce between Mr. and Mrs. Gouldsberry because I don’t know when she received her divorce. I am not employed by Mr. Novick now and have not been

(Testimony of Patrick J. Friede.)

in the past. He never had one thing to do with my business at all. I have never worked for him. I believe Mr. Hamilton worked for him for a few weeks as bartender. I have been convicted of a crime—larceny. That was practically a year ago.

And thereupon,

CHARLES OTTOSON

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is Charles Ottoson. I have been a resident of Seward off and on since 1923. I am acquainted with Mr. Novick. I remembered being in Mr. Novick's place when there was a quarrel—I don't remember the day. I remember being there when Mr. Gouldsberry and Mrs. Carroll and Bill Carroll were there and there was an altercation of some kind. I was sitting at the back end of the bar alongside of Mrs. Carroll. I was there for some time. I don't know what time I was there either. I was there when something happened. I was sitting alongside Mrs. Carroll and after a while Ans came in—or Ansel—we call him Ans for short, that is, Mr. Gouldsberry, and he had a beer on the other end of the bar—something to drink, I wouldn't know for sure what was in the glass. He was sitting there for a while, then he moved seats so he could get up to us at last, and he had a pup with him. And he

(Testimony of Charles Ottoson.)

was sitting alongside of us and he [110] commenced talking nice, and he spoke to them people. He said: "Let by gones be bygones and let's have a drink." But somehow or other that didn't last long. That conversation took a different color and I would say he used some abusive language, to Mrs. Carroll. He didn't use any language to me at all, because when this rough conversation come up I said: "This is no place for me," so I moved away. The rough conversation started with an argument. Mr. Gouldsberry was arguing with his wife or Bill probably. Will was behind the bar at the time—Bill Carroll. I daresay Mr. Gouldsberry was arguing with both Mrs. Carroll—but that's the time I left, when I heard this rough conversation come up. So I went to the other end of the bar then and I didn't hear much. I heard some of the rough conversation. I can't replace word for word because it was a long time ago it happened and I can't think of any word to describe that was used, but there was a rough conversation and there was a good many words in the rough conversation—I mean it was bad, or vile—slander and—I guess there was some names called, but I don't remember what name. It was bad names, I remember, and I left because I say this is no place for me. That's the reason I left. I don't like to listen to that kind of talk. I think Mr. Gouldsberry started using this bad language. For the start he was sitting alongside of me and I was sitting in between him and Mrs. Carroll, but then after a while he raised up and he was standing behind Mrs. Car-

(Testimony of Charles Ottoson.)

roll, and that was when he started to use bad language. Mr. Carroll was behind the bar. He naturally would hear this bad language. I don't know whether some of the conversation was addressed to Mr. Carroll because I went to the other end of the bar and I thought to myself, well, I will get out of this. I don't remember anything at all that Mr. Gouldsberry might have called Mr. Carroll or Mrs. Carroll —any name at all. All I remember is that Mr. Gouldsberry started the argument and then [111] I left. I stayed in the place partly—partly I went out to see Bill come in or somebody. I saw a fight in there that evening. I seen them on the floor there. I don't know how it happened that he got—they got on the floor. Gouldsberry was on the floor and there was two or three more around him and I remember Mrs. Novick was there. I looked over there once and Mrs. Novick had ahold of his arm and tried to get him up on his feet. She didn't strike him. She tried to get him up on his feet. I don't remember whether Mrs. Novick was in the place at first—I don't think she was. As near as I can remember, no. I don't recall how Mr. Gouldsberry got on the floor. I guess that's the time, probably, when I had my back turned. I didn't see anyone else on the floor. Mrs. Carroll could have been on the floor, too, because they were all around the floor there and I didn't take particular notice. I wouldn't say whether or not Mrs. Carroll was on the floor in an unconscious condition. I really don't know because there were about four of them there or five. The fellow—

(Testimony of Charles Ottoson.)

swamper was there—and they were all in the mixup, so it's pretty hard to tell really what happened. I didn't see them striking or beating Mr. Gouldsberry—I don't remember—really know what they were doing. It looked to me like if they left him alone he would have got up some way or other, and he was kicking and I don't know what it was—it was a mix-up, anyway.

Q. Mr. Gouldsberry was kicking?

A. Well, they were laying on the floor, yes. Mr. Novick was not there at the time. I don't think Mrs. Novick was there in the beginning of this. She came in afterwards. When I looked over there I seen she had ahold of his arm and it looked like she tried to help him up off the floor—not when he was going out, but when he was laying on the floor there. I don't recall whether or not Mrs. Novick said anything to Ans. I didn't hear her say anything because I was standing on the other end of the bar and you couldn't hear from there. I wasn't taking any notice and [112] you couldn't hear from there. I wasn't taking any notice, and you couldn't hear anything anyway, and sometimes I went out on the street and come back again. So I didn't hear anything. I wasn't in there when Mr. Gouldsberry left. I had left before that. I don't remember what happened afterwards.

Cross-Examination

By Mr. Davis:

I was sitting near the end of the bar, Mr. Gouldsberry was on one side of me and Mrs. Carroll was

(Testimony of Charles Ottoson.)

on the other, and I heard some rough language. In the beginning, there it was Gouldsberry that had the floor then, but what happened after that—no doubt there was plenty of loud speaking. I didn't tell you after that I couldn't hear any rough language. There was some rough language. I mean that there was rough language but I don't know what was said. I can't recall the words. Gouldsberry started the rough language. I don't remember what he said at all. I didn't hear anything said about buying a bathrobe for some man and having it charged to Mr. Gouldsberry. To begin with, the conversation was: "Let bygones be bygones." The dog that Mr. Gouldsberry was carrying was mentioned a little bit. There was a pup, and whether it was me or somebody else that asked the age of that dog, and Mrs. Carroll remembered the age of the dog. In fact, I had the dog on my lap for a while myself. When this rough language started I left. I went up to the end of the bar for awhile and was talking to somebody there too, and then I went outside—or looked out through the door—and then I come back again. I didn't see anybody strike anybody. I didn't see no blows passed, but when I came back in there and looked there was a tangle of four or five on the floor and Gouldsberry was one of them. The others were the two ladies and Bill Carroll and—I don't know his name, they call him Tiny—the fellow who was swamper there. By the two ladies, I mean Mrs. Novick and Mrs. Carroll. They wasn't all on the [113] floor but they was around there. I didn't

(Testimony of Charles Ottoson.)

see Mrs. Novick come in. I can't recollect Mrs. Novick was there to begin with. I recall she was there later on. I didn't see that she struck any blows. I know when I saw her she seemed to be trying to help him up. I feel that he probably could have gotten up if the others had let him alone. I didn't see they tried to hamper him much either way. No, he didn't get up—when I looked for the time being he didn't. I was there when the police came. I went in there once when he was already there, and I went out again. I seen them. I didn't see them take Mr. Gouldsberry away. Mr. Gouldsberry was in the saloon when the policy came. He was not sitting on the stool. When the police come, I was in there—or I mean I seen the police there, and Mr. Gouldsberry—it seems to me like he was still on the floor at the time the police came. I wouldn't be sure about that though. I didn't see the police take him away.

Redirect Examination

By Mr. Baumgartner:

I am not a frequent visitor of Novick's bar. This year I think I have been in there two or three times, or four times—something like that. I don't know who takes care of the liquor store which is adjacent to the bar proper. There is a sign there, "See the bartender" or something.

And thereupon,

CHARLIE C. PETERSON

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My names is Charlie C. Peterson. I have lived in Seward 21 years. I know the Novicks and Mr. Gouldsberry. I recall of their being a little altercation in Novick's place in which Mr. Gouldsberry and Mr. Carroll were involved. I was not present at that time. I was there immediately afterwards. I was there after the fight started. Mr. Gouldsberry was still there when I arrived. I don't recall in what manner he left Novick's place. When the fight started, we left right away. I started down the street—first went up to the Northern and then I started back down the street. I started up the street to the Northern and made a phone call and came back down and went on by. That phone call had something to do in connection with this business. I called the police. I didn't get him on the phone. I saw him afterwards, Pete Kerestine. I wasn't in there after he arrived. I then went down to the Palace, stopped in to have a drink—finish the drink—we didn't finish that one. I saw Mr. Novick at the Palace. I spoke to him about this affair at his place. I asked him if he knew there was trouble up in his bar and he says: "no" and he left. I told him there was a fight, that's all. I

(Testimony of Charlie C. Peterson.)

knew who had been in the fight—it was Gouldsberry and Mr. Carroll. I don't know anything at all about the fight or how it started. After I told Mr. Novick there had been a fight in his place, he left the Palace bar and went out. I believe the police had already arrived by the time Mr. Novick got there.

Cross-Examination

By Mr. Davis:

Q. Were you there, Mr. Peterson, when this fight started? A. No.

Q. Do you know who took part in the fight that was there? Did you see any of the fight at all?

A. I saw them fighting, but I didn't pay any attention.

I believe it was Bill and Mr. Gouldsberry doing the fighting. There were other parties involved—a big fellow that was working there. I don't know his name. He said he was swamping out. Mrs. Carroll wasn't in the fight but she was there. When I looked around I didn't see her at all, in the fight. I believe she was standing up. [115] Mr. Gouldsberry was on the floor when I left there. I didn't see the fight start. I remember a conversation I had a week or so ago with Mr. Metcalf. I don't remember telling him it wasn't Mr. Gouldsberry's fault, but—I [116] don't remember what I did tell Mr. Metcalf. I think he questioned me about it—if I was there when the fight started and if I knew how it started and who started it. I told him I was there but I thought they was fighting when we come in, but I guess it started after I came in. I

(Testimony of Charlie C. Peterson.)

didn't see the start of it. I was in and out. I went to call the police and didn't get the police and then met Pete on the street. But I didn't stop in again after I left there. I was not back in Novick's at all after I left there. I don't know that the police were there by the time Novick got back. I know I talked to Pete. I know I talked to Bill and that's really all I know about this.

And thereupon,

PETER P. KERESTINE

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is Peter P. Kerestine. I have been a resident of Seward since August 25, when I got out of the service—about August 25th up until December. I had lived here prior to—I was with the Military Police. On the 5th of July, 1946, I was working as Chief of Police for the city of Seward. I was called to Novick's bar on the evening of July the 5th. I had a date but I met Mr. Charlie Peterson as I was going through the alley and he told me there was a fight at Novick's bar. I proceeded immediately to go to Novick's bar. As I arrived, there, I seen Mr. Gouldsberry—he was on the outside of the door—and this here fellow by the name of Gilbert was blocking the doorway so

(Testimony of Peter P. Kerestine.)

he couldn't get back in; and I placed Mr. Gouldsberry under arrest and took him towards the police car, and he kept on yelling, and a fellow by the name of George Jones—he is Outside at the present time—I believe he helped me to get Mr. Gouldsberry in the police car. Mr. Gouldsberry was resisting my efforts to put him in the police car. As to his physical condition—well, at that time, he seemed to be pretty [117] capable of handling himself. He was on his feet—he was walking. I had a time getting him in the car; he was giving me so much resistance. The man by the name of Gilbert was blocking the door so he couldn't get back in the bar-room. Mr. Novick I believe, was standing in back of Gilbert. I didn't notice so much at the time until—I wanted to get him in the car to get him off the street. He was walking all right at that time.

Cross-Examination

By Mr. Davis:

I didn't see the fight at all. When I got there, Gilbert was blocking the doorway and he was standing on the outside trying to get in. I had my car right in front of the place down there at Novick's Cocktail Lounge, as they call it—that would be 30 or 40 feet from that door into my car, in order to walk around. The car was parked as I come down through the alley going up the alley. The door you had to go into was on the reverse side—on the other side of the car. I was parked on the same side of

(Testimony of Peter P. Kerestine.)

the street as Novick's. My car faced North. I took him around the car and put him in the opposite side of the car. This was the front door of Novick's I am talking about. I think Mr. and Mrs. Novick and also Mr. and Mrs. Carroll signed the complaints against Mr. Gouldsberry. I signed one on him causing disturbance.

Redirect Examination

By Mr. Baumgartner:

When we was in the Military Police we was in and out of Novick's Cocktail Lounge practically every hour, patrolling the beat. I don't recall any disturbance in there during that time.

Recross-Examination

By Mr. Davis:

There must have been some kind of disturbance in there this one time because they had him on the outside of the door. I don't [118] know what went on on the inside because I wasn't there.

And thereupon,

MRS. ANNETTA NOVICK

being duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is Annetta Novick. I am the wife of William H. Novick. We have lived in Seward since

(Testimony of Mrs. Annetta Novick.)

1941. We were, on the 5th of July, proprietors of Novick's Cocktail Bar and Liquor Store. I recall what I saw there some time in the evening or night of July 5th. I was not in there when Mr. Gouldsberry came in. I was in the liquor store. That is where I am regularly stationed—in the liquor store. That is a separate and distinct place of business from the Cocktail Bar. I went into the liquor store to get a glass of water and I walked down to the end of the bar where they were sitting and, in fact, I didn't even know Mr. Gouldsberry when I seen him. Jimmie told me that he was in there. By "Jimmie," I mean Mrs. Carroll. And I got my glass of water and I spoke to all of them and everything seemed to be all right. I walked back in the liquor store and sit down and started to read, and I heard a racket and I dashed in there. Bill wasn't there, so I dashed in to see what it was all about, and they were all on the floor. Mr. Gouldsberry and Bill, and Jimmie was out—she was unconscious when I came in. I tried to move her over so she wouldn't get hurt, but I wasn't able to do it; and I tried to get them separated and the porter was helping me to try to separate them. The man mentioned as Tiny and also as Gilbert was the porter. I didn't participate in this quarrel in any way whatsoever except to try and separate them and get Mr. Gouldsberry out of the place. They were in such a tangle I couldn't see just exactly what position Mr. Carroll or Mr. Gouldsberry were in. They were both conscious. They were actively engaged in a fight. I didn't at

(Testimony of Mrs. Annetta Novick.)

any [119] time strike Mr. Gouldsberry. I was trying to separate them—to get them separated and I wanted to get him out of the place. I tried to talk to them but they naturally didn't hear me I guess. They paid no attention, of course. I kept asking people—somebody to please call Pete or to call Bill, find Bill. I wanted some help to get them separated. Nobody helped me except Gilbert, the porter. He was trying to help me to separate them. Gilbert didn't strike either of them. Gilbert and I got them separated and we started to push Mr. Gouldsberry toward the front door, and it took all of our strength to do that because he was fighting back all the way and calling very bad names back all the time. Then when we got him to the door he grabbed the door jam and hung on and Gilbert had to pry his hands loose to get him out. And we just got him outside the door when Mr. Kerestine came along and picked him up. He didn't strike me. He was trying to push back all the time—to get back to Bill Carroll to continue the fight. And he was calling names all the time that we were trying to push him back to the door. He was calling the names to Bill. Mrs. Carroll had come to, then. She came to once and she was trying to help us separate them. I don't know just how long she was unconscious but I know she was when I went in there. She was unconscious because I tried to move her and I wasn't able to. The names I say that Mr. Gouldsberry was calling back to Bill were very bad names and he still wanted to go back and have further fight with Bill.

(Testimony of Mrs. Annetta Novick.)

Cross-Examination

By Mr. Davis:

It was five or ten minutes I would say from the time I got my drink of water and went back in the liquor store until I went back in the bar. I couldn't say exactly how long it was between the time when I found Mrs. Carroll unconscious and tried to turn her over and the time she was up trying to help separate the other parties. I was pretty busy trying to separate them—I couldn't say exactly. [120] I wouldn't say exactly nor about how long, nor whether it was a very lengthy period of time. She certainly looked unconscious. She wasn't able to move. She didn't move. I don't know whether she was able to or not. I tried to pull her out of the way and couldn't, and she didn't seem able to move herself. I couldn't say how long she was unconscious. I don't think it was very long. The swamper was trying to separate them.

Q. Tell the jury how you arrived at the fact he was trying to separate them?

A. Well, that is all I can say. He was trying to get them separated and stop the fight. I certainly didn't see him get in any punches. I was not in there at the start of it—no. When I got in there they were on the floor as I said. It seems to me that both Gouldsberry and Carroll were on the bottom at different times, first one and then the other. And Gilbert and I was trying to separate them and we finally got them separated and I told Bill to get

(Testimony of Mrs. Annetta Novick.)

behind the bar, which he did, and we got Mr. Gouldsberry going toward the front of the door—the front door. I don't remember how long Mr. Carroll worked for me after this. I couldn't say because I don't remember. He didn't quit the next day. I don't remember whether he quit the next week or not. I can't tell you because I don't know. As far as I know, there were quite a few strangers in the place and I couldn't expect them to mix up in it. The parties on the floor were too interested in what they were doing to pay any attention to what I was saying as far as I know.

Redirect Examination

By Mr. Baumgartner:

I knew that she (Mrs. Gouldsberry) was getting a divorce, and he came in the liquor store one night and asked—wanted his alarm clock, and she had just come in there and so she left right away and he went right out after her. I didn't see anything or know anything personally myself, of any actual existing grievance between them. [121]

And thereupon

MRS. LUCILLE CARROLL

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is Lucille Carroll. I have been in the Territory of Alaska a little over five years and have

(Testimony of Mrs. Lucille Carroll.)

lived in Seward most of that time. At one time, I was the wife of the plaintiff, Mr. Gouldsberry. We was married five years the 19th of March last year. I divorced him the 27th day of May, 1946. I married Mr. Carroll June 1, 1946. I was present the night of this altercation on the fifth of July, 1946. I was sitting at the end of the bar talking to Mr. Ottoson. I forget exactly just what he and I were talking about, but it was all friendly because Mr. Ottoson and I have always been friends, for I have long-shored in Seward myself—driven jitney on the dock. And the first I knew of Mr. Gouldsberry being in there was when Mr. Carroll came down to the end of the bar and says: "Mr. Gouldsberry is in here and would like to buy you a drink. Is that all right?" And I said: "Yes, if he feels friendly that way." I really want it that way, because I want to be friends with everyone. Then he come down and congratulated me and I thought everything was O.K. Then he proceeded to tell me that he loved me. My husband was tending bar at that time and he proceeded to tell me he loved me and he asked me: "Do you think that thing behind the bar loves you?" And I told him, I says: "Mr. Gouldsberry"—rather, I called him Anson—"My and your life is all over and finished and I wish you all the happiness in the world." Then he proceeded to call me several different names. I don't like to repeat such names. Well, he called Mr. Carroll a pimp and said he was pimping for some wenches on the line, and I had been with practically every man in Seward,

(Testimony of Mrs. Lucille Carroll.)

and then he called me a [122] dirty bitch slut whore. And I says: "I beg your pardon?" Well the next thing I knew there was bottles flying and Mr. Gouldsberry threw a bottle that put out a light at the end of the bar, and I got in—then the next thing I knew Ans had a bottle in his hand and it went back in his face. Bill knocked it back in his face and I got between them, and as far as Mr. Gouldsberry starting to hit me, he didn't. He started to hit Mr. Carroll and I stepped between them and I got hit on the nose. That was accidentally. Then when I got kicked out—I don't think I was out very long—and when I was kicked out that wasn't for me either. I just stepped between them because I didn't want any fight over me. I had had enough trouble as it was. Mrs. Novick wasn't present when the fight started. After—I just don't know exactly when she came in, but I think it was after I had got up and was on my feet, I don't know. She was trying to help me up and I felt like I was actually floored because I had accidentally got kicked in the stomach. Well, they finally got Bill and they started to the back with him, and then Mr. Gouldsberry—I said—I put my hands on his shoulder like this. I says: "Ans, please leave. Haven't you caused me enough trouble?" And then he jerked away and he started to throw a bottle. And as they was leaving, Mr. Carroll and Tiny and Mrs. Novick were taking Mr. Carroll into the bar—not into the bar, but into the office around the end of the bar.

(Testimony of Mrs. Lucille Carroll.)

Q. At the rear of the bar? Were they trying to separate or were they trying to participate in the fight?

A. They was trying to separate, and so was I because I had had enough trouble without asking for more. I didn't want any trouble. I never have. I did not at any time see Mrs. Novick lay her hands on Mr. Gouldsberry. The only thing that she did, she asked Mr. Gouldsberry to leave and she did put her hand—she said: "Mr. Gouldsberry" or "Ans," I don't—forget exactly which she called him—"please leave." [123] And he said to her: "Yes, Mrs. Novick." Pete Kerestine didn't come into the bar and get Mr. Gouldsberry out. Mr. Gouldsberry was out on the sidewalk raising Cain to get back in there. I imagine he wanted to get back in there and get into another scrap. I would say that Mr. Gouldsberry started this fight in the first place. He used the bad names. And I said, "I beg your pardon?" because I wanted no trouble, and I still want no trouble.

Q. Do you know who struck the first blow?

A. Well, the bottle—Mr. Gouldsberry threw the bottle, and the next one was to be thrown was knocked back into his face. Now, I don't know how you would call which was which because one got in the other would have. Mr. Gouldsberry threw the first bottle and then when he was holding another bottle ready to throw it, it was pushed against his face. Mr. Carroll had started around the bar. Mr. Carroll is very active and very fast on his feet,

(Testimony of Mrs. Lucille Carroll.)

and he is really a little faster than I even thought. This thing happened quite suddenly. The first thing I knew I had been out but Mr. Gouldsberry didn't mean to hit me, I don't think, in the whole thing. I was just trying to get between to separate them because I wanted no fight. I was struck in the face and the nose by a blow that was aimed at Mr. Carroll by Mr. Gouldsberry. It caused my nose to bleed. It was an accident as far as him aiming at me. I just stepped between and took it. I didn't want anyone of them to hit each other. I didn't strike either one of them because all I wanted was peace. I never saw Tiny the swamper strike him. He tried to separate them. The only person that I know of—I was present all the time—that actually struck Mr. Gouldsberry was Mr. Carroll. Mr. Gouldsberry definitely did start it.

Cross-Examination

By Mr. Davis:

I am the same Mrs. Carroll that was in court yesterday to secure [124] a divorce. I remember testifying here at that time, and that Mr. Carroll is a drunkard. He does have a vile temper when he is drinking. Otherwise when he is sober he is a very gentle fellow. When he is drinking he has a vile temper—the worst I have ever seen. Mr. Gouldsberry started this fight. When he came down there he started calling me names and he started calling Mr. Carroll names and he said that Mr. Carroll was pimping for a couple of nigger wenches on the line.

(Testimony of Mrs. Lucille Carroll.)

And he said "Do you think that pimp bastard behind the bar loves you?" And I says: "I do," which I found out that the only thing that Mr. Carroll does love is his whiskey. After this fight started, I did everything I could to break it up. I didn't want to see either one of them hurt. I have never felt ill towards Mr. Gouldsberry at any one time. I lived with Mr. Gouldsberry for five years. While we had our disagreements we got along reasonably well. He, I will say, was a very good provider. I know the couple of blows I caught—one in the face and one in the stomach, was aimed for somebody other than me. I know they was aimed for Mr. Carroll. Mr. Gouldsberry sent both of these blows, because I stepped between them. Mr. Carroll does wear glasses and he can't see very well without them. In fact, he can hardly see in front of him without his glasses. He can see all right if he has his good glasses—he has two pairs. Then, after I got kicked in the stomach accidentally, I was out for a short time. I don't think it could have been for long and after that I saw Mrs. Novick and she was trying to separate the parties.

Q. And she asked Mr. Gouldsberry to leave and he said he would and did? Is that right?

A. No, he didn't leave without a little force.

Q. And who used that force?

A. Well, the only thing, Tiny kept pushing him toward the door—Gilbert or Tiny, whatever they call him—and then he tried to get back in. This man Tiny is a pretty husky man—bigger, quite a

(Testimony of Mrs. Lucille Carroll.)

bit bigger than Mr. Gouldsberry. [125] I would say Mr. Carroll is smaller than Mr. Gouldsberry. I asked Ans to leave—told him hadn't he caused me enough trouble and asked him to leave. Mr. Gouldsberry threw the bottle that hit the light. [126] I saw him throw it. He picked it up and threw it. It didn't hit anybody; it hit the light. I guess it was the one from which he had been drinking. It was an uncapped beer bottle. I don't think he had had more than two or three swallows. There was beer all over the wall. This light is kind of at the end of the bar and when Mr. Carroll heard Mr. Gouldsberry call me this bad name he came down to that end of the bar. He was going around when Mr. Gouldsberry threw the bottle. He wasn't any space at all from Mr. Gouldsberry at the time Mr. Gouldsberry threw the bottle. But Bill is fast—he is even faster than I thought. I would say he was a little better than the width of the bar from Mr. Gouldsberry at the time the bottle was thrown. I guess the bar is maybe two feet—two and a half feet wide but he was kind of down this way—there is a slant at the end of the bar. That lamp is higher up than I am and I am tall. It is quite a little higher up—I think several feet. At that time, Mr. Carroll was behind the bar coming around. He was coming around—the fight was getting ready to start and I didn't want it to start. I was seated at the end stool. Mr. Gouldsberry was sitting at that time, on the stool away from me. There was one stool in between us. He was sitting on the third stool from

(Testimony of Mrs. Lucille Carroll.)

the end of the bar. He was half seated on the stool and one foot on the floor. I don't know whether you would call it exactly sitting down. I would call it half sitting and half standing. He got the other bottle right in front where Mr. Ottoson had had his bottle. That bottle had a little in it. I would say it was about half full. That was the second bottle Mr. Gouldsberry picked up. I don't know how he picked it up. He just grabbed it. You don't know just exactly how anybody does anything—when a fight or trouble starts you don't watch just exactly how it starts. I wouldn't say he turned the bottle upside down. I wouldn't say he had it by the neck. I would say he had it just like anybody else would have a bottle, around the middle. I didn't exactly notice his hands. I just knew there was trouble brewing. I saw him pick a bottle up. [127] He grabbed the bottle. I couldn't say exactly how his fingers were, but he grabbed the bottle. I don't think he grabbed it upside down, holding the neck and with the bottle upside down. The side of the bottle—the way it was, the side of the bottle—it seemed like the side of it hit his face when it went back. The center of the bottle hit his face. If we had a bottle maybe I could show you. I am trying to tell you—he grabbed this bottle—He was holding the bottle as a person normally holds a bottle, around the middle. Mr. Carroll knocked it back in his face. Mr. Gouldsberry had a cut on his face and it bled. The bottle didn't break, I don't think. It hit him on his cheek. I couldn't say which cheek but I know

(Testimony of Mrs. Lucille Carroll.)

I saw the blood. I didn't see any blood around his lips because the cut on his face was bleeding. I certainly have been convicted of a crime—drinking, once. That was right here in Seward.

And thereupon,

WILLIAM H. NOVICK

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is William H. Novick. I am one of the owners of the bar that has been discussed today. I am acquainted with the plaintiff, Mr. Gouldsberry. I have seen him four times before today—heard about him. I had, at one time, a man in my employ by the name of Bill Carroll. That is the same Bill Carroll who is one of the defendants in this action. I only know what was told to me by my wife and other people that witnessed it,—this affair which occurred in my place of business on the evening of the 5th of July, last year.

Q. Had you known of the existence of any ill feeling between Mr. Carroll and Mr. Gouldsberry prior to this occurrence?

A. There had been a fight right in front of the place sometime previous to this happening. I would say about six weeks prior to that. As I walked [128] out of the liquor store—I didn't know Mr. Gouldsberry at that time at all, but Mr. Carroll and Mrs.

(Testimony of William H. Novick.)

Gouldsberry—at that time—were approaching down the sidewalk going south toward the dock, and as they approached the front of the tavern Mr. Gouldsberry struck Mr. Carroll and knocked him down on the sidewalk, breaking his glasses. Mr. Carroll had his glasses on and there was another young man by the name of Ferguson—he is outside at the present time—struck Mr. Gouldsberry and knocked him out in the street alongside his car. And at that time Mr. Kerestine, the Chief of Police, come along and I asked him to pick Mr. Gouldsberry up, which he did, and sent him home and told him to behave himself. That was all that happened that night, and I went back in the liquor store. This next afternoon I was coming out of the liquor store and Mr. Gouldsberry happened to be coming by and spoke to me. He says: "I kind of made an ass out of myself last night." And I looked at the gentleman—I didn't know who it was. And it dawned on me it must have been Gouldsberry, and I said: "Yes you did more than that. You struck a man with glasses on. You might have blinded him." And when I said that, he said: "I should kill him." I said: "You have probably repeated the same thing to others and you might get in severe trouble because something might happen that you didn't have anything to do with and you will be held responsible." And somebody came along and I had to go into the liquor store, and that was my last conversation with him up until the time he was brought to the city jail. At this particular time, after this fight occurred,

(Testimony of William H. Novick.)

there were present at the bar, when I arrived, from the restaurant, Bill Carroll, my wife, and Gilbert, who they call Tiny—he used to do the porter work there after closing hours. Mrs. Carroll was there too. She was complaining about a pain in her stomach which we got Dr. Sellers to tend to. When I came, Bill Carroll was behind the bar. He had some blood on his jacket and was all mussed up. His hair was all rumpled up too. And I told him to take the jacket off and clean himself up and calm down. I believe he continued in my [129] employee about two or three weeks. He is someplace in Seward here. That was Mr. Carroll that sat down here this morning for some time. The man has been broken up ever since his divorce come up and he has been doing some drinking and he is not in fit condition to talk. In other words, he is unreliable in what he says now—he is in a stupor. I have never had any difficulty whatsoever with Mr. Carroll while in my employ before in respect to his quarreling with any patrons of the bar, only that sometimes he takes one drink too many and the minute that happens he lets go. I have had the man employed time on and time off. He is honest and capable and very courteous when he is sober. On this evening I last saw him about fifteen minutes before I left and went over to the Palace. He was absolutely sober then—Hadn't drunk anything for weeks.

The defense rested.

And thereupon:

MR. GOULDSBERRY

called as a witness in his own behalf, testified in rebuttal as follows:

Direct Examination

By Mr. Davis:

I cannot recall having called those names having been mentioned here. I never called nobody no bad names. I don't recollect—I don't recollect calling them names. I deny it. I didn't throw a bottle and hit the lamp, that I know of. No, I did not. I never told Mr. Novick that I would kill the so-and-so if I got 20 years for it. I can't say as to whether I broke Mr. Carroll's glasses. I might have broken them. I won't say that I didn't and I won't say that I did because I can't say. I can't say that I did break them or that I didn't. I don't know. That is the occasion that I mentioned this morning in which I said I slapped him. I do remember pulling his glasses off because Mrs. Carroll said "Don't you hit him because he has glasses on." And I pulled them off. Whether she picked them up and took them in her hand, I don't know, because I was pretty mad. She was still my wife and married to me and I was supporting her, yet. When I went to the hospital I had bruises on my back and shoulder and across my chest and on my knee, [130] and I have got a scar there yet that I got—and on my face. It was all skinned. My doctor said they was just minor bruises. He said they would heal up and he said I was in pretty bad shape. I don't feel that

(Testimony of Mr. Gouldsberry.)

I am responsible in any way for what happened there in the bar. I didn't start no trouble that I know anything about. I was reasonable. I have never started trouble anywhere that I know of. I have been decent to everybody—treated everybody as near right as I know. But you can ride a good horse to death, you know. I was in the doorway when the police picked me up. I was not trying to get back in there that I know of. I was not trying to get back at Mr. Carroll there. I never called nobody no names. I did say he was a dirty rat and a skunk to hit me like he did hit me with a bottle. I do know that.

And thereupon, Plaintiff's case-in-chief having been reopened,

IRVIN L. METCALF

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Davis:

My name is Irvin L. Metcalf. I live in Seward, Alaska. I am Deputy United States Marshal, at Seward. Have been since September 1, 1939. I am fairly well acquainted around town. I know Mr. Gouldsberry. I know Mr. Bill Carroll. I know Mrs. Carroll, the former Mrs. Gouldsberry. I know the reputation for peace and quiet of Bill Carroll and it is poor. I know the reputation for peace and quiet for Mrs. Carroll. It is poor. I know the repu-

(Testimony by Irvin L. Metcalf.)

tation for peace and quiet of Mr. Gouldsberry. It is good. I know I had a conversation with Mr. Charlie Peterson concerning this matter some two or three weeks ago. I had some discussion with him as to whether or not this fight that took place down in Novick's was Mr. Gouldsberry's fault and he said it wasn't.

Cross-Examination

By Mr. Baumgartner:

I asked Mr. Peterson whether or not he had seen this. He said he had seen a disturbance there—part of the disturbance. I don't know whether he saw the beginning of it or not. He didn't say it was Mr. Carroll's fault. He didn't say it was anybody's fault. He said as far as he could see it was not Mr. Gouldsberry's fault. I didn't ask him how far he could see.

And thereupon,

DR. J. H. SHELTON

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Davis:

My name is J. H. Shelton. I reside in Seward. I am a physician and surgeon. I am duly authorized to practice in the Territory of Alaska—duly licensed. I have with me the original X-rays and the case record of the Seward General Hospital on

(Testimony of Dr. J. H. Shelton.)

treatment of Mr. Gouldsberry on July 8, I believe it was, 1946. The X-ray shows fracture of the bone of the ankle—fibula. I was not in Seward at the time this picture was taken. I am just looking at the picture now and it does show a fracture of the ankle. Mr. Gouldsberry came by the office to see me some several days ago,—I don't remember the date—and asked me to look at his X-rays for him and see whether they showed a broken ankle or not—which they did and which I told him they did show—a broken ankle. I think I told him as well as I can remember, that although he felt some small discomfort there in his ankle now, that it was the type of ankle that should get completely well and not leave him with any permanent disability. Such a break as this would cause a person pain and discomfort. He should not have a remarkable pain and discomfort over any long period of time, but naturally, at first it would be painful and after removal of the cast it would be somewhat stiff and tender—oh, for—one might say [132] for several months.

Cross-Examination

By Mr. Baumgartner:

A fracture of this type could be caused by almost any number of things.

Q. Could it be caused by a man kicking a woman?

A. I think if he got a good, clean kick that it probably wouldn't break his ankle. If he kicked pretty straight, it probably wouldn't. If his kick were not carefully placed it probably would.

(Testimony of Dr. J. H. Shelton.)

Redirect Examination

It is possible that the break could be caused by a tussle on the floor in which a number of parties were taking part.

And thereupon, the following proceedings were had:

Mr. Baumgartner: Is that the conclusion of your main case? At this time, then, I would like to make a motion that the verdict be directed instructing the jury that they find in favor of the defendants, Mr. and Mrs. Novick and Mrs. Carroll for want of sufficient evidence indicating that they have been responsible in any manner for this altercation or for the conduct of Mr. Carroll in it. Any altercation that he may have been engaged in venting his personal feelings in the matter against Mr. Gouldsberry, the testimony does not show, but the testimony does show that Mr. Novick was not even near the place. If it please the Court, in the plaintiff's complaint he has alleged that defendants Mrs. Novick, Mr. Carroll and Mrs. Carroll, each took part in this unjustified assault upon his person. The testimony of the plaintiff, himself, was such that he cannot state with certainty that Mrs. Novick put her hands on him at all except, possibly, to push him towards the door urging him to leave as quickly as possible, I suppose without causing any further commotion, disturbance or disruption in their premises. [133]

The testimony on the part of the plaintiff is equally cloudy as to whether or not his former wife, Mrs. Carroll, struck him any blows.

I should not refer, of course, to the testimony of the defendants since this motion should properly have been made after the close of the plaintiff's case, but since it has gone before the Court and is of record, it clearly shows that no blow was struck by any of the defendants with the exception of William Carroll himself.

Now, this appears from the testimony of both plaintiff and the defendants to have been the outcome of a long matrimonial dispute, quarrel or disturbance. Mr. Gouldsberry had not felt entirely right towards Mrs. Carroll after she had left him. He admitted that he struck Mr. Carroll in front of Mr. Novick's place. Mr. Novick also testified that he was anxious that there shouldn't be a further assault upon Mr. Carroll by Mr. Gouldsberry. Mr. Novick made no charge against him, asking he be taken quietly home and to please forget about it and to avoid any repetition of his conduct for fear that it might get him into some trouble; but he was not interested in causing Mr. Gouldsberry any difficulty. On the other hand, he was interested in protecting his interests.

Now, throughout the course of the trial it appears that what occurred was started by Mr. Gouldsberry. Even if it had not been started by Mr. Gouldsberry, if Mr. Carroll, knowing that there was ill feeling between himself and Mr. Gouldsberry, had gone out of his way—gone out on the street and pulled Mr.

Gouldsberry into the bar and struck the first blow, called him the names and had instigated the quarrel from its very inception, that hardly is within the scope of his employment as a servant of Mr. Novick. Has nothing whatsoever to do with his work as a bartender. In connection with his duties as an employee or servant, as the complaint refers to him, he is not supposed to accost or assault people that are in there as [134] patrons, and if he chooses to do something to vent his own personal grievance against anyone, Mr. Novick can't be responsible for that conduct. If that were true, any one of our employees, agent or servants might commit some atrocious crime and we would be held responsible. It would be different if he had done something in the course of his employment—if he had served a drink to Mr. Gouldsberry that was harmful to him, if he would have injured him in any other course, or if Mr. Novick or Mrs. Novick had aided and abetted him and instructed him: "When Mr. Gouldsberry comes in you throw him out" or something to that effect. That would have been an entirely different matter. Then it would have lent color to Mr. Carroll's attitude and consequent action towards Mr. Gouldsberry.

But in this instance Mr. Carroll had been sober and well behaved. It was during a period of his sobriety. The testimony is that he is a heavy drinker during the course of which periods he is unaccountable and his conduct poor. But on this particular occasion he hadn't been drinking. He was quietly minding his own business. He didn't ask to enter

this quarrel, nor did he start it. He merely tried to resist this assault on the part of the plaintiff, and in the course of this argument probably the plaintiff was injured. If he has a broken or fractured ankle as shown by the testimony of Dr. Shelton, undoubtedly he was. He may have sustained even more grave injuries. But that certainly is not the fault even of Mr. Carroll in this instance. If a man is attacked by someone, and in the course of his defending himself the attacker is injured, that is certainly justifiable.

In this instance we feel that Mr. Novick, Mrs. Novick, not having had anything to do with any injury or assault upon Mr. Gouldsberry, and also Mrs. Carroll, who merely stood by and was herself accidentally injured, she has been liberal enough to admit under oath that these blows that he struck were not intended for her—she received them accidentally. There has been no testimony that she struck and beat him. The plaintiff is confused. He doesn't know how to state positively whether a thing occurred or not until he had been prompted, and then he doesn't know definitely then what occurred. First he stated that he was knocked out and unconscious. Then he amended that by saying he was partially conscious—partially aware of what had happened. But he never at any time positively stated that either of these three defendants took any active part in beating, striking or causing him any injury.

And that reason—and for the reason that Mr. and Mrs. Novick as employer of Mr. Carroll, who

conducted this fight, with or without justification—should relieve them entirely from any responsibility whatsoever in connection with the assault.

I don't know—probably as far as the question of Mr. Carroll's liability in the matter is concerned, that is undoubtedly a matter for the jury to decide whether or not he, under the circumstances, should also be held unaccountable. But as far as these defendants are concerned, they are clearly, your Honor, out of the picture as far as being responsible or liable for any conduct on the part of the employee, Mr. Carroll.

We, therefore, think that the jury should be instructed that they cannot find a verdict against Mr. and Mrs. Novick and Lucille Carroll.

And thereafter, on Thursday, March 27, 1947, at 9:30 o'clock a.m., the following proceedings were had:

The Court denied the motion of the defendants for an instructed verdict on behalf of several of the defendants, said motion having theretofore been made by Mr. Baumgartner, and directed that the exceptions of the defendants be noted. [136]

And thereupon,

THOMAS E. HOWELL

being first duly sworn, testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

My name is Thomas E. Howell. I am, at present, Municipal Clerk and Magistrate, and was, on

(Testimony of Thomas E. Howell.)

the 5th day of July, 1946. There was a complaint made against one Anson E. Gouldsberry on the 5th day of July, 1946, if I remember right, and it was made by Mr. and Mrs. Carroll. Pete Kerestine made one at the same time. He was Chief of Police. (Witness is handed some papers.) Witness continuing: These were the complaints filed in that case. They are the original complaints, original records from my office.

The papers were offered and admitted in evidence and marked as Defendants' Exhibits A and B. The Witness continuing: I don't remember any other complaints made by any other person or persons against Mr. Gouldsberry at this time or at any other time during the month of July, 1946. I would have to look at the records. I don't believe either Mr. or Mrs. Novick ever made a complaint against Mr. Gouldsberry. I don't remember of my records showing such complaint having been made by either of them. (Witness is handed Defendants' Exhibit A). Witness continues:

This was signed by Peter P. Kerestine, who was Chief of Police July 5, 1947: "Started a fight and made a nuisance of himself on the streets of Seward and caused a disturbance." The outcome of that charge was he was given two days to produce witnesses. The trial was held Monday at 10 a.m., which was July 8, and he was fined \$50.00. He appeared before me Saturday morning, the day following. This case was heard on the second floor of the jail. I believe I was there when Mr. Gouldsberry

(Testimony of Thomas E. Howell.)

arrived. So far as I [137] know, he just walked up and down stairs. I don't remember whether or not he had any difficulty in walking (Witness is handed the Defendant's Exhibit B). Witness continuing:

This is signed by Lucille Carroll and William A. Carroll. This is the same date—July 5, 1946. It was fighting Mr. and Mrs. Carroll in Bill Novick's Bar—threw a bottle at and had Mrs. Carroll on the floor beating her up also. Call the parties several names and used awful profanity. The outcome of that charge was the same. He appeared Saturday morning and we gave him two days to produce his witnesses. Trial was held Monday, 10 a.m., July 8, 1946. He was fined \$100.00. He refused to pay the fines and I think he spent two or three days in jail. I would have to look at the record. And then he finally paid the fines. Both of these matters were heard at the same time. He chose to spend several days in jail rather than pay the fine at first. And then he subsequently paid the fines.

Cross-Examination

By Mr. Davis:

I have been City Clerk and Magistrate a year the first of next month, or the first of May, I should say. I had been City Magistrate about two months when this matter came up. It would be—yes, two months, I guess. Those complaints I have given you have been in my possession. I had them for awhile and then the Chief of Police took them and

(Testimony of Thomas E. Howell.)

kept them in his records. As a matter of practice here, I have had some complaints in my possession and he has had some.

Q. Now, were you in the court room yesterday when Mr. Kerestine testified? A. Yes, sir.

Q. Did you hear him testify that Mr. and Mrs. Novick did sign a complaint in this case?

A. I don't remember.

Q. Well, if he did so testify, is he mistaken?

A. It would be in the record anyway. These are the complaints; these are the original complaints.

Q. That is right, these are the original complaints. [138] The record might show what complaints were issued and so forth? These are two original complaints against Mr. Gouldsberry?

A. Correct.

Q. So far as these records go, there may be lots of other complaints? A. Right. [139] ...

One of Mr. Gouldsberry's friends paid his fine for him actually. I said he paid it because he was credited with the account. Actually, he refused to pay the fine. He said he'd rather stay in jail. He didn't believe the trial was fair, he said. He said he didn't think he was guilty of the charge and then one of his friends came over and paid the fine, at a later date. I didn't know that it was Mr. Pallage that paid the fine. Pete would have to check: I am not sure. I didn't receive the fine myself. Not directly, no.

And thereupon,

PETER P. KERESTINE

heretofore duly sworn, resumed the stand and testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

Q. Mr. Kerestine, did Mr. and Mrs. Novick sign a complaint against Mr. Gouldsberry?

A. On that complaint I probably got mixed up when Mr. and Mrs. Novick was up there with Mr. Carroll. At that time they were up at the station and I believe there were only two complaints signed. I don't know of the existance of any other. If there was they would probably be around the files. Mr. Gouldsberry didn't have any difficulty in walking, even kicking or fighting. At the time he walked upstairs he walked up by himself in the morning.

Cross-Examination

By Mr. Davis:

When I testified after that Mr. and Mrs. Novick did sign a complaint, I thought that they did but I probably was mistaken, unless at that time Carroll was over there—

Q. For what reason have you changed your testimony? You thought you were right yesterday?

A. Yes, because they was all [140] battered around there. No one has told me that they didn't sign a complaint since that time. I thought he ac-

(Testimony of Peter P. Kerestine.)

tually did sign the complaint because he came up there at the time Carroll was there in the morning. Yes, I received the fine money in this case. I remember when Mr. Pallage came to pay that fine that he said he wanted to see what he was buying here and asked to see the complaints. I don't recall showing him a complaint signed by Mr. and Mrs. Novick at that time. I showed him two complaints there. It is not a fact that Mr. Gouldsberry was charged \$50.00 on each of three complaints, making a \$150.00 fine. It was a hundred dollar fine and a fifty dollar fine. I had these complaints in my possession and I turned them over to the City Clerk. I probably had them in my possession on the tenth and maybe the 15th of July. I was at the city desk in the police station at that time. I actually thought when I testified yesterday that Mr. and Mrs. Novick signed the complaints. At that time, she came up, and it was in the morning that the complaint was signed. At that time, the Novicks were taking an active part in this, they came up there for court. That is the reason, probably that I thought they signed a complaint. That I thought so yesterday and don't think so today is not because Mr. Howell has testified there wasn't. It is because I wasn't quite clear yesterday on the case as it came up. Since I sat and heard the case, my recollection is a little better today than yesterday. What I most likely was thinking over last night was the trial up there at the city jail that went on.

(Testimony of Peter P. Kerestine.)

Redirect Examination

By Mr. Baumgartner:

You (referring to Mr. Baumgartner), never at any time, prior to my coming on the witness stand this morning, asked me anything [141] about these complaints.

And thereupon,

WILLIAM H. NOVICK

heretofore duly sworn, resumed the stand and testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

I heard Mr. Davis say something yesterday about the undisputed testimony regarding my remark that I would break Mr. Gouldsberry's neck. Mrs. Novick and I were both present this morning when Gouldsberry ran up the stairs to hear his trial.

Mr. Davis: That question is improper, your Honor. I object to it.

The Court: Objection is sustained.

Witness (continues): The first time I and Mrs. Novick came up there was Monday morning after he had his continuance to obtain witnesses and attorney. The time he was granted his continuance neither one of us was up there. There was a misunderstanding because I was late getting downtown and it was already postponed until the following

(Testimony of William H. Novick.)

Monday when I got down. Mr. Gouldsberry had already left. The time that I was present was on the 8th. The gentleman was asked if he had counsel, and he said that his counsel wasn't able to appear and that he would stand trial. And as I recall you was present, yourself, and at that time acting as City Prosecutor. I did make a remark to Mr. Gouldsberry about breaking his neck but I didn't state it in those words. I said: "If you continue messing with people you would probably—will get your neck broken." I didn't say I would do it. At that time I was a member of the council of the City of Seward. I was not on the Police Committee. I did not sign a complaint against—or any [142] other time. I have not signed any complaints against anybody since I have been in Alaska or Seward.

And thereupon,

MRS. ANNETTA NOVICK

heretofore duly sworn, resumed the stand and testified for and in behalf of the defendants as follows:

Direct Examination

By Mr. Baumgartner:

I did not at any time in my life sign a complaint against Mr. Gouldsberry. I did hear vile and abusive language used by Mr. Gouldsberry in the bar on the evening of the 5th of July. When the porter and I was trying to get him to the front door, why, he was calling back names at Bill Carroll all the time, in a loud voice. There were quite a few other people

(Testimony of Mrs. Annetta Novick.)

present. I couldn't name just who they were. I was very much too busy to notice just who was there. It is not very ladylike to say some of the words he called back.

Q. I think probably the jury should know.

A. Well, he called him a cock-sucker, for one thing, and a dirty old rat, and there was more that I can't recall just the words. I told him then, I said: "Ans, don't use that language; I don't stand for it here." He said: "All right, Mrs. Novick," and he turned right around and still kept hollering back at him. We had him close to the door at that time. Gilbert and I—the porter—was pushing him toward the door trying to get him out, and he was fighting us all the way back. I don't mean he was hitting anybody, but he was trying to get away from us to get back and fight some more.

Mr. Davis: Your Honor, so far as I can see this is a direct rehash of testimony she gave yesterday I don't believe it is [143] proper rebuttal.

Court: Objection sustained.

And thereupon,

HENRY J. PALLAGE

heretofore duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Davis:

I did, sometime about the 10th or 15th of July, go to pay Mr. Gouldsberry's fine in this case. I

(Testimony of Henry J. Pallage.)

paid his fine. At the time I paid the fine I read the complaints. I was asked my reason for wanting to see those complaints. I said I wanted to pay the fine and asked to see the complaints. The city clerk asked me why I wanted to see them and I said: "I would like to see what I am paying for." That was my only reason for asking that. I read the complaints over to the police station. There were three complaints, and one was signed by Pete Kerestine and one was signed by Mr. and Mrs. Carroll, I believe—I wouldn't say for sure whose names all were on that one—and I was sure that there was one signed by Mr. and Mrs. Novick.

Cross-Examination

By Mr. Baumgartner:

I saw these complaints upstairs in the police station. There were three separate papers. I was positive there was three separate papers, yes. I have known Mr. Gouldsberry about two years, possibly a little more. I learned he was in difficulty by Guy Terrell, when he came by my cabin and told me—asked if I knew where Ans was and I said: "Why, no, I have no idea." "Well," he said, "He is in jail." I said: "What happened?" "Well," he said, "I don't know, but somebody should go down and see if they can help him." Well, naturally, I went down there to see what I could do and when I found that he had a \$150 fine to pay then I thought I would go pay it. There was no

(Testimony of Henry J. Pallage.)

other connection whatsoever. I would do that for any neighbor. He absolutely did not ask me to pay the fine. Nobody asked me to pay it. I went down and paid it. He paid me back. I didn't pay the full \$150, though, because just a minute or so before I went to pay it Peter Kerestine told me \$140 would be all right. I don't remember exactly how long it was before Mr. Gouldsberry paid me back. It wasn't very long after—possibly several days or so. You see, I was busy at the time doing other things and working and he was, I believe, in the hospital. I know one afternoon when I didn't work he went by later and he was in the—still in the hospital. I would say several days. I don't remember. I didn't pay any attention whatsoever to the dates. I wouldn't say that I am a very good friend of Ans's. I am a friend of most anybody in my neighborhood. He lives half a block or so from me. Sometimes I visit him frequently—it all depends. Sometimes—oh, two or three weeks may go by when I don't go close to his place. Then again I go over there, depending on what shift I work, or whether I am working or not or whether the boats are in or not. I wasn't present at the trial Ans had. I didn't know anything about it at all. I don't know what complaints were used at the trial. I was not in his trial. I didn't know he was arrested or in trouble or anything until this man came and told me he was in jail.

Q. And you are positive that you saw a complaint signed by Mr. and Mrs. Novick?

A. I am sure of that.

(Testimony of Henry J. Pallage.)

Q. And you are sure that the complaint was used against Mr. Gouldsberry?

A. Well, it was assault and battery, and the other assault and battery, if I remember right, and then the third complaint the chief of police had signed said resisting an officer.

Q. Resisting an officer?

A. Resisting arrest. [145]

And thereupon, both sides having rested, the Court instructed the jury as follows:

Ladies and Gentlemen of the Jury, you are instructed as follows:

1.

“The plaintiff, Anson E. Gouldsberry, has brought this action against the defendants, William H. Novick, Annetta Novick, William Carroll and Lucille Carroll, claiming compensatory damages in the total sum of \$17,337 and punitive damages in the sum of \$500 on account of an alleged assault and battery committed by the defendants upon the person of the plaintiff at a place called Novick’s Cocktail Lounge, owned and operated by the defendants William H. Novick and his wife Annetta Novick at Seward, Alaska, on July 5, 1946, and by reason of other circumstances connected with such assault and battery as alleged in the plaintiff’s complaint in this action.

“The defendants in their answer have denied all liability and assert in substance that any damages sustained by plaintiff were the result of his own unprovoked attack upon the defendant, William Carroll.

“When you retire to consider of your verdict you will take with you to the jury room the plaintiff’s complaint and the defendant’s answer wherein the plaintiff has denied all of the allegations of the answer which are in conflict with the allegations of the plaintiff’s complaint. It is your duty to carefully read and consider these pleadings before discussing the merits of the case in order that you may fully understand the respective claims of the plaintiff and defendants.

2.

“In this case, as in all civil cases, the burden is upon the plaintiff to prove his case by a preponderance of the evidence only, and not, as in criminal cases beyond reasonable [147] doubt. Preponderance of evidence means the greater weight of evidence. If the evidence in your mind is equally balanced as between the plaintiff and defendant, then the verdict should be for the defendant, because the burden is upon the plaintiff to present evidence of greater weight than that in favor of the defendant before plaintiff is entitled to recover.

3.

“One who unlawfully and without just cause assaults and beats another is liable to such other person for the damages sustained by the latter, and if the assault and battery so committed were committed maliciously, then the guilty party is liable not only for the actual damages sustained by the person assaulted, but also may be subject to punitive damages as hereinafter explained.

“An assault is an attempt with unlawful force by one person to commit physical injury by violence upon another, and a battery is the consummation of assault whereby one person may beat or strike or injure, or in some cases even touch the other without lawful justification. It is for you to say from all of the evidence in the case whether the plaintiff sustained any such assault and battery at the hands of the defendants or any of them.

3-A

“Any person who is present at the commission of an assault and battery by one person upon another, encouraging or inciting the same by words, gestures, looks or signs, or who in any manner or by any means participates in such assault or assault and battery, is in law deemed to aid and abet therein and, therefore, is liable as a principal. But it is to be borne in mind that mere presence at the time and place of the commission [148] of an assault and battery does not render a person liable as a participant therein.

4.

“In this connection you are instructed that a person who is himself attacked always has the right of self defense. He is under no duty to retreat; but may stand his ground and repel force with force, and the person so attacked may use for his own protection such force as reasonably appears under the circumstances to be necessary for his protection.

“The use of abusive language by one person to another such as the calling of vile names, however repulsive or offensive such names may be, does not

under the law justify or excuse an assault and battery on the person guilty of using the offensive language. If you find from the evidence that the defendant William Carroll struck the plaintiff as alleged in the complaint, and if you further find that the plaintiff had not made and was not making any assault or battery on the defendant William Carroll, and that the only excuse offered by the defendant William Carroll for striking the plaintiff was the fact, if you find it to be a fact, that the plaintiff immediately before the defendant William Carroll struck the plaintiff called the defendant William Carroll, or the defendant Lucille Carroll, vile and offensive names, then it will be your duty to find for the plaintiff against one or more of the defendants, in harmony with these instructions, such damages as you may find from the evidence the plaintiff suffered, not to exceed the amount asked in the plaintiff's complaint.

5.

"No proof has been given that the defendant William H. Novick was present on the occasion when plaintiff claims he was [149] so unlawfully assaulted and beaten by the defendants, and testimony was admitted to show that said defendant William Novick was not present at that time. However, it is alleged in the complaint and admitted in the answer that the defendants William H. Novick and Annetta Novick were the owners and operators of the cocktail lounge where the altercation occurred, and that at that time the defendant William

Carroll was the employee of the defendants William H. Novick and Annetta Novick in said cocktail lounge. Therefore, it appears by the pleadings and by the evidence that at the time and place mentioned the relation of employers and employee existed between defendants William H. Novick and Annetta Novick as employers and the defendant William Carroll as employees.

“As employer may be liable for the acts of his employee resulting in injury to another person where the employee, in committing such injury, was acting within the scope of his employment and in the line of his duties while engaged in such employment, or if the employer ratified the act of his employee causing the injury to such other person.

“If in this case you may find from a preponderance of the evidence that the defendant, William Carroll, committed an unlawful assault and battery upon the plaintiff, and that in committing such assault and battery the defendant William Carroll was acting within the scope of his employment and in the line of his duties while engaged in such employment, or if you find that such unlawful assault and battery was committed by defendant William Carroll and that the defendants William H. Novick and Annetta Novick, or either of them, ratified the act of the defendant William Carroll in assaulting and beating the plaintiff, then the defendants William H. Novick and Annetta [150] Novick may be held liable in damages, as follows: If you find that the defendant William Carroll committed such alleged unlawful assault and battery upon the plain-

tiff and in so doing was acting within the scope of his employment, both of the defendants William H. Novick and Annetta Novick are equally liable in damages with the defendant William Carroll; and if the defendants William H. Novick and Annetta Novick, or either of them, ratified the said alleged unlawful acts of defendant William Carroll, the one or both of said defendants who so ratified are similarly liable in damages with the said defendant William Carroll.

“By ratifying a wrongful act of an employee, the employer may become liable in damages to another person injured thereby although he would not otherwise be liable. What constitutes ratification is a question of fact for the jury to determine. In this case it is for you to say from all of the evidence whether the defendants William H. Novick and Annetta Novick or either of them ratified the acts of the defendant William Carroll as regards the alleged unlawful striking and beating of the plaintiff.

“In this connection you may consider, and give such weight as you think proper, to the testimony received in the trial of the case relative to the continued employment of defendant William Carroll by defendants William H. Novick and Annetta Novick subsequent to July 5, 1946, the testimony of the alleged signing of criminal complaints against the plaintiff by the defendants William H. Novick and Annetta Novick on or after July 5, 1946, and the testimony relative to an oral statement alleged to have been made by the defendant William H.

Novick as to the altercation between the defendant Carroll and [151] the plaintiff which occurred on July 5, 1946, and the events connected therewith. With respect to this testimony, as in the case with all other testimony, you are the sole judge of its weight and value.

6.

“An employer is liable for the acts of his employee, even if such acts are wilfull or malicious, where they are done in the course of his employment and within its scope. But where an employee does a wilfull and malicious act resulting in injury to another while engaged in working for his employer, but outside of his authority, as when he steps aside from his employment to gratify some animosity, or private grudge, or to accomplish some unlawful purpose of his own, not in any manner connected with his employment or the duties thereof, and completely outside of the scope of his employment, the employer is not liable.

7.

“The proprietor of a place of amusement, or any other place of business, has the right to remove therefrom any person if such person is conducting himself in an unlawful or disorderly manner, using all necessary force to do so.

8.

“If you find that the plaintiff is entitled to recover damages from the defendants, or any of them, he is entitled to recover for the physical pain and mental anguish he endured, if any, as a result of the

alleged assault and battery, and his incarceration in jail, as well as compensation for time necessarily lost from his work by reason of the injuries which he claims to have sustained through such assault and battery; he is also entitled to recover the amount necessarily paid for the services [152] of a physician and all other sums that he was required to spend in order to heal and cure himself of his wounds. All of the foregoing items comprise what is known in law as "compensatory damages."

9.

"The plaintiff in this case demands punitive damages against the defendants in the sum of \$5000. Punitive damages are damages which may be granted as a punishment to the offender for the benefit of the community and a restraint to the person who has violated the law. Such damages are given only in cases where the act committed was malicious or wanton or showed a reckless indifference for the rights and welfare of another, or there is some other element of aggravation which justified such damages. No punitive damages can be given against any defendant unless such defendant is first found to be liable to the plaintiff for compensatory damages.

"If in this case you find for the plaintiff and against any of the defendants for any amount of compensatory damages, then you may consider whether you should further award to the plaintiff punitive damages. Such damages as hereinbefore indicated can be lawfully given only where the act of the defendant was malicious or wanton or showed

reckless indifference for human rights or welfare. It is within the province of the Jury to give or withhold punitive damages as the law and justice may require. Accordingly, in this case you should determine from all of the evidence, first, whether the plaintiff is entitled to compensatory damages, and if so, whether he is entitled to recover such damages from all of the defendants or from some or one of them, and then you may consider and should determine whether in addition to such compensatory damages you should award punitive damages in favor of the plaintiff and against the same defendants or defendant against [153] whom you assess compensatory damages.

10.

“The laws of Alaska provide that all questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although the jury has the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you believe to be errors of law upon the part of the Court.

“All questions of fact, other than these heretofore mentioned in these instructions, must be decided by jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider

any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

“You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

10-A.

“Testimony has been received showing that two of the witnesses [154] who testified in this case have been convicted of crime. Such testimony is admissible as bearing upon the credibility of the witnesses involved, and for no other purpose. It is for you to say whether, and to what extent, if at all, the credibility of said witnesses is affected by proof of former conviction of crime, for the credibility of all witnesses is for your sole determination.

11.

“The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

“However, your power of judging the effect of evidence is not arbitrary, but it is to be exercised with legal discretion and in subordination to the rules of evidence.

“You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

“A witness wilfully false in one part of his testimony may be distrusted in others.

“Testimony of the oral admissions of a party should be viewed with caution.

“Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

12.

“The law forbids quotient verdicts. A quotient verdict is arrived at by having each juror write the amount of damages or compensation to which he believes the plaintiff is entitled, adding the amounts so set down, and then dividing the total by the number of jurors, usually twelve, the resulting figure being given as the verdict of the jury. Such verdicts are highly improper and under no

circumstances should you resort to that method of adjusting differences of opinion among yourselves.

13.

“At the close of the trial counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, as far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

14.

“You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions. [156]

“As you have been heretofore instructed, your duty is to determine the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.

“During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

15.

“Upon retiring to the jury room to consider your verdict, you will elect one of your number who will speak for you and date and sign the verdict unanimously agreed upon. You will take with you the pleadings in the case consisting of the plaintiff’s complaint, the defendants’ answer and the plaintiff’s reply to said answer, the exhibits and these instructions.

“Several forms of verdict have been prepared for your use. You may find a verdict in favor of the plaintiff and against all of the defendants, or against such of the defendants as you think should be required to pay damages to the plaintiff under the evidence and under these instructions as to the law, or you may find for all of the defendants and against the plaintiff.

“If you find for the plaintiff and against all of the defendants you should use the form of verdict which is marked Verdict No. 1, and insert therein the amount of damages which you find the plaintiff is entitled to recover of the defendants as compensatory damages, and also the amount of damages, if any, which you find that the plaintiff is entitled to recover of the defendants as punitive damages.

The verdict should be dated and signed by your foreman and returned into court as your verdict.

“If you find for the plaintiff and against one or more, but not all, of the defendants, then you should use the form of verdict which is marked Verdict No. 2, and insert therein the names of the defendants whom you find to be liable to respond in damages to the plaintiff as well as the amount of compensatory damages and punitive damages, if any, and also insert therein the names of the remaining defendants for whom you find as against the plaintiff. This verdict should then in like manner be dated and signed by your foreman and returned into court as your verdict.

15-A.

“If you find for all of the defendants and against the plaintiff, then you should use Verdict No. 3, which may be dated and signed by your foreman and returned into court as your verdict.

“The verdicts not used by you should be destroyed by your foreman.

“Dated at Seward, Alaska, this 27th day of March, 1947.”

And I have signed this as District Judge.

Counsel may come to the desk with the reporter to take exceptions.

(At this time the following proceedings were had in the presence of the jury but not in the hearing of the jury:)

Mr. Baumgartner: In regard to Instruction No. 5, it seems as though too frequent reference is made to the term “within the scope of employ-

ment" without giving that phrase any definition, thereby making it possible for the jury to feel as though anything that might be done in there was within the scope of his employment. The plaintiff will undoubtedly play up very strongly the fact that anything that was done by Carroll was under the course of employment as a bartender. We would prefer to have some paragraph inserted to the effect that if the defendant Carroll conducted himself in such a manner as he did, he did not necessarily [158] act within the scope of his employment.

The Court: Has counsel any definition to suggest? Have you written out anything?

Mr. Baumgartner: It appears as though the word "scope of employment" in this particular instance could be defined, perhaps, such as the following:

"If the jury finds that the defendants Novick"—

both Novicks, that is—

"placed any instrumentality in the hands of the defendant Carroll such as would then give him an opportunity to use such an instrumentality or agency in such manner that it might do harm to one of the patrons of the cocktail lounge, rather than having him conduct himself independent of any instrumentality that might be there; for example, if the Novicks handed Carroll a bottle, or placed some other weapon near his place of employment to use in cases such as these, or had previously told him that; if there is any argument use this, or use that—"

The testimony shows that he was quiet and peaceful during the course of his employment, and when he didn't conduct himself in that manner he was discharged.

The Court: Is that all there is to—

Mr. Baumgartner: That is all.

The Court: The exception, of course, is noted as of course and it may be that I can—

Mr. Davis: I wonder, your Honor, if you haven't taken care of that objection by some of the other instructions which say if a man steps outside of the scope of his employment for purposes of his own the employer is not liable?

The Court: I thought I should define "scope of employment" and [159] I wasn't able to get a definition satisfactory to myself without going into evidence, and I think it is the duty of the Court not to make any such comment under the guise of instructions. At any rate, you have the exception.

Mr. Baumgartner: I am fully aware of the existence of this instruction which Mr. Davis called your attention to—No. 6—but nevertheless if there are two instructions, one of which might enable the jury to lean toward one rather than the other, that is not quite fair to the defendants. One side will say: "Well, sure, they are not liable," but the other side will say: "Well, here it is."

The Court: Very well. Anything else?

Mr. Baumgartner: That is all.

The Court: Mr. Davis? By the way, before you get through: I did not give in express language any of the instructions submitted by counsel for the

defendants, but if counsel desires he can now take exception to the refusal of the Court to give those instructions as submitted and they may be filed. The record will show now that the instructions submitted by counsel for defendants are each and all refused except as embraced in instructions as given. Do you wish to take exception to the refusal of the Court to give your instructions. It might not do any harm, and if you should want to appeal—

Mr. Baumgartner: Yes.

The Court: Record may show an exception by the defendants to the refusal of the Court to give the instructions requested, if that is satisfactory?

Mr. Baumgartner: Yes. [160]

The instructions referred to above, requested by the defendants and which the Court refused to give to the jury, are as follows:

DEFENDANTS' REQUESTED INSTRUCTIONS

I.

The Court instructs you that the law is the master, in this case Mr. and Mrs. Novick, is not responsible for the acts of the servant, in this case William Carroll, done outside of the masters' business and to accomplish some end personal to the servant himself; that the law does not imply any authority from the master to the servant to commit an assault upon a person who is not injuring or threatening to injure the master's property, and who is not interfering with the servant's performance of his duty to the master; and if, in this case, you believe from

the evidence, that the defendant William Carroll struck the plaintiff Anson E. Gouldsberry for some reason or purpose of his own, the plaintiff cannot recover in this case from the defendants William Novick and Annetta Novick, and your verdict must be for the defendants William Novick and Annetta Novick.

II.

The jury is instructed that the outcome of any altercation of an employee with others, resulting from an assault and battery precipitated by matters and things having nothing to do with the duties and employment of such employee, is not within the scope of the employment of such employee, and the employers cannot be held accountable therefor; that if the defendant William Carroll had any kind of personal quarrel with the plaintiff Gouldsberry, in or upon the premises of the defendants William Novick and Annetta Novick, and such quarrel resulted in injury or damage to the plaintiff Anson E. Gouldsberry, then the defendants William Novick and Annetta Novick cannot be held responsible, or liable therefor, unless it is shown by the evidence that the employers William Novick and Annetta Novick actually participated in the quarrel, argument or fight, or encouraged or aided [161] the employee Carroll.

III.

The jury is instructed, that if it is reasonably satisfied from the evidence on this trial that the plaintiff Anson E. Gouldsberry, made threats to do harm to the defendant William Carroll, and if

in fact the plaintiff Anson E. Gouldsberry carried out his threats by assaulting the defendant William Carroll, who was at the time an employee of the defendants William H. Novick and Annetta Novick; and the defendant, in resisting the attack of the plaintiff Anson E. Gouldsberry, caused the plaintiff Gouldsberry any injury, then the defendant Carroll cannot be held liable therefor, and the defendants Novick, Carroll's employers, can in no manner be held responsible or liable for any injury or damage to the plaintiff Anson E. Gouldsberry.

IV.

The jury is instructed that the proprietor of any place of business has the right to remove any person therefrom if such person is conducting himself in a disorderly manner; that in this case, either Mr. or Mrs. Novick, or their employee, Mr. Carroll, had the right, and it was their duty, to cause the plaintiff to be moved by force if necessary from the bar or cocktail lounge, if, from the evidence, the plaintiff Gouldsberry was conducting himself in a manner not conducive to peace and good order, and if the plaintiff was making a disturbance likely to cause injury or damage to persons or property in or upon the premises of the Novicks.

V.

The jury are charged that if they shall be reasonably satisfied from the evidence that the alleged assault and battery by Carroll upon the plaintiff in the case arose out of a personal dispute between the plaintiff and the said Carroll, they must find a verdict for the defendants, notwithstanding the fact

that Carroll was in the employ of the defendant Novick at the time of the alleged assault, unless they shall be reasonably satisfied that defendant authorized or participated in such act.

Mr. Baumgartner: Yes

Court: It will not hurt your record any.

Mr. Baumgartner: As long as the exceptions are shown, it is satisfactory.

Mr. Davis: Your Honor, I wish to except to the failure to give a portion of Requested Instruction No. I on behalf of the plaintiff, the portion having to do with the fact that the jury may infer that the party lent his aid and his countenance and approval to the assault and battery, if any, by reason of the fact of him being present and not taking any part to stop the affray.

Court: Exception will be noted.

Mr. Davis: I wish to except to the failure of your Honor to give Requested Instruction No. II on behalf of the plaintiff.

Court: Exception will be noted.

Mr. Davis: Also Requested Instruction No. III.

Court: Exception will be noted.

Mr. Davis: Requested Instruction No. IV.

Court: Exception will be noted as of course.

Mr. Davis: I think as to Requested Instructions V and VI your Honor has given them substantially, in other wording. No exception to failure to give V and VI.

Court: All of the instructions submitted by counsel for the plaintiff may be filed and the ruling of the Court is that each and all of the requested in-

structions will be marked: "Refused except as embraced in instructions given. Exception taken and allowed."

Mr. Davis: As to Instruction No. 6 as given by the Court, it seems to me that there should be a sentence on the end to the effect that employer is not liable for the acts of the employee outside the scope of his authority unless the employer [163] ratifies the act, as ratification has been mentioned in the previous instructions. Of course, I realize the Court has instructed the jury they are not to pick out any one instruction—they are to consider the instructions as a whole—and if that is done, 6 by itself is all right, but if No. 6 is picked out as one instruction then it isn't broad enough, in my opinion. I wish to take exception to it to that extent. That's all.

Court: I am not sure it isn't covered, but I shall add to No. 6 by putting a comma after "liable" and add the words:

"unless you find by a preponderance of the evidence that the employer has ratified the acts of his employee as hereinbefore explained."

All right, anything else? I will say that orally to the jury now.

Mr. Baumgartner: If the Court please, now, as this instruction stands isn't there a likelihood that the jury might feel as though simply because he was retained in employment—

Court: They may, but that seems to be the law.

Mr. Baumgartner: That wouldn't constitute ratification.

Court: It is evidence of ratification, that is, the law puts that construction on it, in my judgment. If you desire——?

Mr. Baumgartner: Yes, we except to that instruction.

Court: Well, the record will show that Mr. Baumgartner excepts to the inclusion of this additional language in No. 6. Is that right?

Mr. Baumgartner: Yes.

Court: You except to the giving of that?

Ladies and gentlemen of the Jury: Aided by the advice of counsel, I am adding one clause to Instruction No. 6. I will [164] read that again so will have it all.

“An employer is liable for the acts of his employee, even if such acts are wilfull or malicious, where they are done in the course of his employment and within its scope. But where an employee does a wilfull and malicious act resulting in injury to another while engaged in working for his employer, but outside of his authority, as when he steps aside from his employment to gratify some personal animosity, or private grudge, or to accomplish some unlawful purpose of his own, not in any manner connected with his employment or the duties thereof, and completely outside of the scope of his employment, the employer is not liable, unless the jury finds by a preponderance of the evidence that the employer has ratified the acts of his employee as hereinbefore explained.”

Court: Before starting arguments I think it may be as well to take a recess, and court will stand in recess for ten minutes until ten minutes of eleven.

(Whereupon recess was had at 10:40 o'clock a.m.)

After Recess

Court: May I advise counsel that in the amendment to instruction No. 6 I at first used the word "you" and in writing it I have substituted the words "the jury." It means the same thing.

Counsel for plaintiff may proceed to opening argument. The record, without objection, will show all members of the jury present.

Mr. Davis: Your Honor, I am willing to waive reporting of the argument if Mr. Baumgartner is.

Mr. Baumgartner: Yes [165]

Court: Very well, record may show reporting of argument is waived pursuant to stipulation of counsel, and reporter may be excused until recalled.

(Reporter was recalled at 11:25 o'clock a.m.)

Court: After the instructions were given one of counsel suggested that the instructions were deficient because no attempt had been made to define certain phases such as "scope of employment" or "course of employment", and while at that time I was not ready to attempt a definition, while counsel for plaintiff was arguing I have written out an additional instruction with a view of endeavoring to give the jury some advice upon the meaning of the

terms used in the instructions as written. This instruction will be afterwards typed and will be included in the instructions. It will be numbered 5-C.

5-C

“Reference has been made to acts done by an employee “within the scope of his employment” or in “the course of his employment.” Those phrases are not easily defined.

“An act done by an employee is within the scope of his employment and in the course of his employment where such act is or reasonably appears to be necessary, or proper, or suitable, to accomplish the purpose, or the work, or the duties of his employment, although in excess of the powers actually conferred on the employee by the employer. But an act is not necessarily done in course of employment or within scope of employment because done on the employer’s premises and by use of the employer’s property. An act cannot be said to be within the scope of the employment, where the employer himself, if present, would have no authority to do the act.” [166]

And thereafter, the case having been argued by the respective counsel and the case having been submitted to the jury, the jury on March 27, 1947, returned a verdict for the plaintiff finding for the plaintiff and against the defendants and awarding the plaintiff the sum of \$2000.00 compensatory damages, and the sum of \$1500.00 punitive damages.

And thereafter, on the 30th day of June, 1947, the Court entered its judgment in accordance with said verdict.

And thereafter, and within the time allowed by law, the defendants filed their motion for a new trial, which motion, was denied by the Court to which ruling the defendants excepted and the exception was allowed.

And thereafter, on the 15th day of September, 1947, the defendants having filed their petition for an appeal in said action, and said appeal having been allowed, the Court granted the period of 75 days for the filing and presentation of a Bill of Exceptions in this cause.

The matters and things hereinabove in this Bill of Exceptions set forth not fully appearing of record, the said defendants, William H. Novick and Annetta Novick, tender and present the foregoing as their Bill of Exceptions in said cause and pray that the same be settled, allowed, signed and sealed, and made a part of the record in said cause by this Court, pursuant to law in such cases.

Dated at Anchorage, Alaska, this 8th day of October, 1947.

/s/ **GEORGE B. GRIGSBY**
Attorney for Defendants

Service admitted this 8th day of October, 1947.

/s/ **EDWARD V. DAVIS**
Attorney for Plaintiff

[Endorsed]: Filed Oct. 8, 1947. [167]

DEFENDANT'S EXHIBIT "A"

Gouldsberry vs. Novick
S-4337

In the Municipal Court of the Town of
Seward, Alaska

THE TOWN OF SEWARD, ALASKA,
Plaintiff,
vs.

ANSON E. GOULDSBERRY
Defendant.

Complaint for Violation of Ordinance
No. Ord. 31. No. Se. 18

Anson E. Gouldsberry, is accused by City of Seward. in this complaint of the violation of Ord. 38 Sec 18 Committed as follows, to wit:

The said Anson E. Gouldsberry in the corporate limits of the Town of Seward, Alaska, and within the jurisdiction of this Court, did, wilfully and unlawfully, on the 5th day of July started a fight and mad a nuisance of himself on the streets of Seward and cause a disturbance contrary to the form of the Ordinances in such cases made and provided.

/s/ P. P. KERESTINE.

Subscribed and sworn to before me this 6th day of July, 1946.

/s/ THOS. E. HOWELL.
Municipal Magistrate
Town of Seward, Alaska.

Monday 10:00 A.M. F.E.H.
July 8, 1946 \$50.00 Bail. [168]

DEFENDANT'S EXHIBIT "B"

Gouldsberry vs. Novick

S-4337

In the Municipal Court of the City of
Seward, AlaskaTHE CITY OF SEWARD, SEWARD, ALASKA
vs. Plaintiff,

ANSON E. GOULDSBERRY, Defendant.

Complaint for Violation of Ordinance
No. Ord. 31. No. Sec. 2

Anson E. Gouldsberry, is accused by Mr. & Mrs. Bill Carroll in this complaint of the violation of Ord. 38, Sec. 2 Committed as follows, to wit: Assault and Battery.

The said Anson E. Gouldsberry in the corporate limits of the City of Seward, Alaska, and within the jurisdiction of this Court, did, wilfully and unlawfully, on the 5th day of July, 1946, was fighting Mr. and Mrs. Carroll in Bill Novick Bar, threw a bottle at and had Mrs. Carroll on the floor beating her up also, called the parties several names and used awful profanity. Contrary to the form of the Ordinances in such cases made and provided.

/s/ LUCILE CARROLL,
WILLIAM A. CARROLL.

Subscribed and sworn to before me this 6th day of July, 1946.

/s/ THOS. E. HOWELL,
Municipal Magistrate, City of
Seward, Seward, Alaska.

Monday 10:00 A.M. T.E.H.

July 8, 1946 \$100.00 Bail [169]

In the District Court for the Territory of
Alaska Third Division

No. A-4337

ANSON E. GOULDSBERRY,

Plaintiff,

vs.

WILLIAM NOVICK, ANNETTA NOVICK,
WILLIAM CARROLL, and LUCILLE
CARROLL,

Defendants.

STIPULATION

It is hereby stipulated and agreed by and between counsel for the plaintiff and defendants above-named, that the foregoing Bill of Exceptions and statement of the testimony introduced at the trial of the above-entitled action is a true, correct and accurate statement thereof.

It is further stipulated and agreed, that said Bill of Exceptions may be approved and settled as the Bill of Exceptions in said cause immediately and without further notice.

Dated at Anchorage, Alaska, this 16th day of January, 1948. [170]

/s/ EDWARD V. DAVIS,

Attorney for Plaintiff

/s/ GEORGE B. GRIGSBY,

Attorneys for Defendants

[Title of District Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS

The defendants in the above-entitled action, William H. Novick, and Annetta Novick, having applied to the Court for an order approving the foregoing Bill of Exceptions in the above-entitled action, and plaintiff and defendants by and through their respective counsel having stipulated that said statement of evidence and Bill of Exceptions is a true, correct and accurate statement of all the testimony introduced in the trial of said cause, and having stipulated that said Bill of Exceptions may be approved and settled as the Bill of Exceptions in said cause without further notice; and

It further appearing that said Bill of Exceptions contains a statement of the evidence in the case in condensed and narrative form and by question and answer, and is complete and correct, and said Bill of Exceptions having been heretofore presented to the Court for settlement within the time allowed by law and the rules of this Court, and the Court being fully advised in the premises, it is therefore

Ordered, that the foregoing Bill of Exceptions be, and the same hereby is approved and settled as the Bill of Exceptions in the above-entitled cause upon appeal of the defendants to the United States Circuit Court of Appeals for the Ninth Circuit; and it is

Further Ordered, that this order shall be deemed and taken as a certificate of the undersigned Judge of this Court who presided at the hearing of said

cause, and before whom all the evidence in said cause [171] was given; that the said Bill of Exceptions contains a condensed statement in narrative form and by question and answer of all the evidence given in said cause, and upon which the judgment therein is based.

Dated this 16th day of January, 1948.

/s/ ANTHONY J. DIMOND,
Judge. [172]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court, Third Division,
Alaska:

You are hereby requested to make transcript of record in the above-entitled action to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in said cause, and to include in such transcript the following papers of record in said cause:

1. Complaint.
2. Demurrer.
3. Order Overruling Demurrer.
4. Answer.
5. Reply.
6. Instructions.
7. Verdict.
8. Motion for a New Trial, and affidavits in support of and in opposition to said motion.
9. Memorandum of exceptions to Instructions.

10. Defendant's requested Instructions Nos. 1, 2, 3, 4, and 5.
11. Judgment.
12. Petition for Appeal.
13. Order Allowing Appeal.
14. Citation on Appeal. [173]
15. Assignment of Errors.
16. Minute Orders of Sept. 15, October 20, Dec. 5, 1947, and Jan. 16, 1948.
17. Bill of Exceptions.
18. This Praeclipe.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant and
Appellant.

Service admitted this 16th day of January, 1948.

DAVIS & RENFREW,
By /s/ G. KELLNER,
Attorney for Plaintiff and
Appellee.

[Endorsed]: Filed Jan. 16, 1948. [174]

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD

United States of America,
Territory of Alaska, Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed pages, numbered from 1 to 174, inclusive, are a full, true and correct transcript of the records

and files of the proceedings in the above entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the stipulation for praecipe filed in my office on the 16th day of January, 1948; that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to \$43.30, has been paid to me by George B. Grigsby, counsel for the appellant herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 19th day of February, 1948.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court, Territory of Alaska,
Third Division. [175]

[Endorsed]: No. 11869. United States Circuit Court of Appeals for the Ninth Circuit. William H. Novick and Annetta Novick, Appellants, vs. Anson E. Gouldsberry, Appellee. Transcript of Record. Upon Appeal from the District Court for the Territory of Alaska, Third Division.

Filed February 27, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11869

WILLIAM H. NOVICK and
ANNETTA NOVICK,

Appellants,

vs.

ANSON E. GOULDSBERRY,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD
TO BE PRINTEDTo the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

Please be informed that the appellants in the
above entitled action hereby adopt as Points on
Appeal on which they intend to rely the Assign-
ments of Error appearing in the Transcript of Rec-
ord and also the following additional points:

I.

That the court erred in instructing the jury as
follows (Extract from Instruction 4):

“The use of abusive language by one person
to another such as the calling of vile names,
however repulsive or offensive such names may
be, does not under the law justify or excuse an
assault and battery on the person guilty or
using the offensive language. If you find from
the evidence that the defendant William Carroll

struck the plaintiff as alleged in the complaint, and if you further find that the plaintiff had not made and was not making any assault or battery on the defendant William Carroll, and that the only excuse offered by the defendant William Carroll for striking the plaintiff was the fact, if you find it to be a fact, that the plaintiff immediately before the defendant William Carroll struck the plaintiff called the defendant William Carroll, or the defendant Lucille Carroll, vile and offensive names, then it will be your duty to find for the plaintiff against one or more of the defendants, in harmony with these instructions such damage as you may find from the evidence the plaintiff suffered, not to exceed the amount asked in the plaintiff's complaint."

Error is assigned on the above instruction on the ground that said instruction is not predicated on the evidence in the case, in that there was no evidence in the case to the effect that the defendant William Carroll, offered any excuse for striking the plaintiff, and in that the defendant, William Carroll, was not a witness in the trial of said cause and in that the only evidence offered in the case as a justification of the acts and conduct of the said William Carroll referred to in said instruction was evidence of self defense; that said instruction was erroneous because it assumes throughout that the said William Carroll was the aggressor, and ignores his defense of self defense as set forth in the answer

herein; and that said instruction was erroneous in that it ignores the question whether or not the acts of William Carroll were in the scope of his employment, or were ratified by the defendants William H. Novick and Annetta Novick, or either of them, and in that said instruction in effect instructs the jury to find a verdict in favor of the plaintiff and against one or more of the defendants, provided the jury finds the facts to be as stated, recited or assumed in said instruction, and regardless of the defenses set up by the defendants and the testimony in support thereof; and in that the words "in harmony with these instructions" are so vague and meaningless as to in no wise qualify said instruction.

II.

That the court erred in giving to the jury Instruction No. 6, which is as follows:

"An employer is liable for the acts of his employe, even if such acts are willful or malicious, where they are done in the course of his employment and within its scope. But where an employe does a willful and malicious act resulting in injury to another while engaged in working for his employer, but outside of his authority, as when he steps aside from his employment to gratify some personal animosity or private grudge, or to accomplish some private purpose of his own, not in any manner connected with his employment or the duties thereof, and completely outside the scope of his employment, the employer is not liable, unless

you find by a preponderance of the evidence that the employer has ratified the acts of his employe as hereinbefore explained,"

to which instruction defendants excepted as follows:

After the jury had been instructed and while counsel for both sides were engaged in taking their exceptions to said instructions the following proceedings occurred:

The Court: * * * I shall add to No. 6 by putting a comma after "liable" and add the words:

"unless you find by a preponderance of the evidence that the employer has ratified the acts of his employe as hereinbefore explained."

* * * * *

Mr. Baumgartner: If the Court please, now, as this instruction stands isn't there a likelihood that the jury might feel as though simply because he was retained in employment—

The Court: They may, but it seems to be the law.

Mr. Baumgartner: That wouldn't constitute ratification.

The Court: It is evidence of ratification, that is, the law puts that construction on it, in my judgment. If you desire?

Mr. Baumgartner: Yes, we except to that instruction.

The Court: Well the record will show that Mr. Baumgartner excepts to the inclusion of this additional language in No. 6.

Appellant designates for printing the entire type-written Transcript of Record on appeal as certified by the Clerk of the District Court, with the exception of the following:

1. The instructions of the Court appearing on pages 18 to 30 inclusive of said Transcript of Record.
2. The Motion for a New Trial appearing on pages 32 to 62 inclusive of said Transcript of Record.
3. Memorandum of Exceptions appearing on pages 63 to 73 inclusive of said Transcript of Record.

/s/ **GEORGE B. GRIGSBY,**
Attorney for Appellants.

Service admitted March 15, 1948.

/s/ **EDWARD V. DAVIS,**
Attorney for Appellee.

[Endorsed]: Filed March 17, 1948.

